Personal Injury From the Plaintiff Perspective

Prepared and Presented by:

Richard J. Serpe
Law Offices of Richard J. Serpe, P.C.

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Maintenance and Cure 101:
21 Basic Points to Remember

The following points provide an overview of the ancient seaman's remedy of maintenance and cure:

1. **The remedy in a nutshell**:

   Every seaman who becomes ill or injured during his employment, regardless of any fault of the owner or operator, is entitled to maintenance, and cure. "Maintenance" is the seaman's reasonable expenses of room and board while ashore, until the seaman is fit for duty or a total maximum benefit of treatment is reached. "Cure" is the reasonable medical expenses in court concurred by the seaman for curative treatment.

2. **Maintenance and cure is an ancient remedy**:

   The obligation to provide maintenance and cure to an ill or injured seaman is "among the most ancient and pervasive of all the liabilities imposed on a shipowner."[1] This remedy dates back almost 1000 years to the Laws of Oleron. Although the nature and extent of risks faced by seaman has changed dramatically, general maritime law development in this area includes references

[1] *Caufield v. A C & D Marine, Inc.* 633 F.2d 1129, 1131-32, 1982 AMC 1033, 1035 (5th Cir. 1982), quoting *Oswalt v. Williamson Towing Co., Inc.*, 488 F.2d 51, 54, 1974 AMC 1311, 1113-14 (5th Cir. 1974).

to seamen as "wards" of the court, and the placement of a "feather light" burden of proof.[2]

3. **No causal link between employment and condition is required**:

The burden is upon the seaman to prove that his disability occurred, was aggravated or manifested itself while he was in the service of the vessel.[3] It is not necessary for a seaman to prove that the illness or injury occurred while the seaman was working or even was aboard the vessel. The disability can occur while on shore leave, so long as the seaman is obligated to return to the vessel if so ordered. [4]

4. **Fault is not required:**

A seaman is entitled to maintenance and cure regardless of the absence of any fault of his employer.[5] [6]

5. **Presumption of the entitlement**:

A seaman seeking this remedy is aided by the presumption of entitlement with all doubts being resolved in favor of provision of maintenance and cure. Courts are

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[2] *Vaughn v. Atkinson*, 369 U.S. 527, 531, 1962 AMC 1131 (1962). See also *Dowdle v. Offshore Express, Inc.*, 809 F.2d 259 (5th Cir. 1987), which traces the historical development of remedies over the last 1000 years.

[3] *Miller v. Lykes Bros.-Ripley S.S. Co.*, 98 F.2d 185, 1938 AMC 1228 (5th Cir. 1938).

[4] *Farrell v. United States*, 336 u.s. 511, 1949 AMC 613 (1949).

[5] *Sana v. Hawaiian Cruises, Ltd.*, 181 F.3d 1041, 1999 AMC 1831 (9th Cir. 1999)

[6] *Sammon v. Central Gulf S.S. Corp.*, 442 F.2d 1028, 1971 AMC 1113 (2nd Cir. 1971)

required to avoid saddling the seaman with complexity and administrative burdens. Maintenance and cure is intended to be a broad and inclusive remedy.[7] [8]

6. **But duty is owed by the plaintiff's employer (*in personam*) and by the vessel (*in rem*)**:

The seaman's employer has an obligation to promptly investigate and pay maintenance and cure.[9] [10] The employer's refusal to pay maintenance and cure while filing of declaratory judgment actions to resolve entitlement has been found to be arbitrary resulting in an award of attorney's fees.[11]

7. **Duration:**

The obligation is owed until the seaman reaches maximum medical cure. Seamen are entitled to maintenance and cure benefits until they have obtained the maximum curative benefit from treatment.[12] This may occur when a seaman is found to be "fit for duty" but does not occur when a seaman may perform light duty work. The obligation may include benefits while a seaman undertakes to

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[7] *Vella v. Ford Motor Co.*, 421 U.S. 1, 1975 AMC 563 (1975)

[8] *Johnson v. Marline Drilling Co.*, 873 F.2d 77, 1990 AMC 2460 (5th Cir. 1990)

[9] *Vaughan v. Atkinson*, 369 U.S. 527, 1962 AMC 1131 (1962).

[10] *Fink v. Shepard S.S. Co.* 337 U.S. 810, 1949 AMC 1045 (1949).

[11] *American Seafoods Co., v. Nowak*, 2002 AMC 1655 (W.D. Wa. 2002).

[12] *Vella v. Ford Motor Co.*, 421 U.S. 1, 1975 AMC 563 (1975)

find new employment. Any question as to whether the seaman has reached maximum cure is to be resolved in favor of the seaman.[13]

8. Palliative treatment is not covered:

Treatments which are designed to eliminate or reduce pain, but are not a cure for the underlying condition, do not warrant reimbursement.[14] There is potentially a third category for therapeutic treatment of incurable diseases which sustain life such as dialysis. Cure is available for this expense.[15]

9. Choice of physicians:

A seaman does not have a right to choose his own physician and is liable for any incremental expense occasioned over and above that which would have been necessary if the seaman had seen the employer's physician.[16] However, the burden of proof of unnecessary expense is on the employer.[17] Regardless of who chooses the physician, a seaman has a duty to mitigate his damages whenever possible.

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[13] *Kratzer v. Capital Marine Supply, Inc.*, 490 F. Supp. 222, affirmed 645 F.2d 477, 1982 AMC 2691 (5th Cir. 1981).

[14] *Farrell v. United States*, 336 U.S. 511, 1949 AMC 613 (1949).

[15] *Costa Crociere, S.p.A. v. Rose*, 939 F. Supp. 1538, 1996 AMC 2797 (S.D. Fl. 1996).

[16] *Kossick v. United Fruit Co.*, 365 U.S. 731, 1961 AMC 833 (1961).

[17] *Caulfield v. A C & D Marine Inc.*, 633 F.2d 1129, 1982 AMC 1033 (5th Cir. 1981).

10. Employer funded plans:

An employer may satisfy its cure obligation by funding a medical plan.[18] There is a split in the authority as to whether Medicaid and/or Medicare benefits which are available to the seaman relieve the employer of the obligation to provide cure.[19] [20]

11. Food and lodging:

The maritime doctrine of maintenance entitles a seaman in the service of his ship to "food and lodging of the kind and quality he would have received aboard the ship".[21] Generally, maintenance is restricted to the actual amount incurred by the seaman, although a seaman who has been unable to afford these basics will not be so restricted. As an initial matter, the seaman has the burden to prove his actual expenses, although his burden has been called "feather light".[22] Thereafter, courts must assess the reasonable cost of food and lodging for a single seaman in the locality of the plaintiff. As a general rule, seamen are entitled to maintenance in the amount of their actual expenses of food and lodging up to the reasonable amount for their locality.

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[18] *Al-Zawkari v. American S.S. Co.*, 871 F.2d 585, 1990 AMC 1312 (6th Cir. 1989).

[19] *Moran Towing & Transp. Co. v. Lombas*, 58 F.3d 24, 1995 AMC 2113 (2nd Cir. 1995).

[20] *In re RJF Int'l Corp.*, 334 F. Supp. 2d 109 (D.R.I. 2004)

[21] *McWilliams v. Texaco, Inc.*, 781 F.2d 514, 1986 AMC 2471 (5th Cir. 1986).

[22] *Yelverston v. Mobile Laboratories, Inc.*, 782 F.2d 555 (5th Cir. 1986).

12. Evidence of actual costs:

Courts allow proof of the seaman's actual expenditures and expert testimony about the cost of living in the area of the seaman's residence.[23] In fact, exclusion of such evidence is reversible error.

13. Evidence of reasonable costs:

In examining reasonable costs of food and lodging, the court may consider evidence in the form of the seaman's actual cost, evidence of reasonable costs in the locality or region, union contracts, and maintenance rates awarded in other cases for seaman in the same region. A court may take judicial notice of the prevailing rate in the district.[24]

14. Historical use of standardized rates:

For decades, the appropriate amount of maintenance was determined by reference to a standardized day rate of $8.00 per day.[25] In the 1970s, courts examining this rate recognized that it was patently insufficient, and alternative standardized rates have been reached in various jurisdictions spanning a broad range of compensation.[26]

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[23] *Yelverston v. Mobile Laboratories, Inc.*, 782 F.2d 555 (5th Cir. 1986).

[24] *United States v. Robinson*, 170 F.2d 578 (5th Cir. 1948)

[25] *Gardiner v. Sea-Land Service, Inc.*, 786 f.2d 943, 1986 AMC 1521 (9th Cir. 1986).

[26] *Alvarez v. Bahama Cruise Line, Inc.*, 898 F.2d 312 (2nd Cir. 1990).

15. Collective bargaining agreements may be enforceable:

A daily per diem rate established by an arm's-length, "give and take", collective bargaining process may be enforceable, or in the alternative, may be considered by the court in assessing the reasonable costs in the locality.[27] [28]

16. Pro-ration of a seaman's actual expenses:

Generally, an employer may not seek pro-ration of a seaman's lodging expenses (such as mortgage payments) to the extent that a seaman is obligated to the lodging expense regardless of the number of people who live with him. Pro-ration has been held to introduce the excessive conceptual complexity that courts have striven to avoid.[29] [30]

17. Malpractice by treating physicians:

Under certain circumstances, an employer may be liable for incremental injury to the seaman caused by the malpractice of treating physicians.[31] First, an employer is liable for negligent selection of an unqualified physician to treat the seaman. Second, employers are liable for the negligence of the shipboard physicians.[32] Third, an employer has a duty to intervene in the face of obvious mal-treatment

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[27] *Berg v. Fourth Shipmor Assoc.*, 82 F.3d 307, 1996 AMC 1591 (9th Cir. 1996).

[28] *Bouchard Transp. Co., Inc. v. Connors*, 2002 AMC 962 (Fl. App. 2002).

[29] *Gillikin v. United States*, 764 F. Supp. 270, 1992 AMC 111 (E.D. N.Y. 1991).

[30] *Hall v. Noble Drilling (U.S.) Inc.*, 242 F.2d 582, 2001 AMC 1099 (5th Cir. 2001).

[31] *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 1933 AMC 9 (1932).

[32] *DeZon v. American President Lines, Ltd.*, 318 U.S. 660, 1943 AMC 483 (1943).

by the physician.[33] There is a split in authority with respect to broader vicarious liability for physicians selected by employers. It has been held that statutory damage caps applicable to physician liability also protect vicariously liable employers.

18. Tort damages for aggravation due to failure to pay:

An employer who fails to timely furnish cure exposes itself in court for any resulting injuries which occur.[34]

19. Emotional distress remedy available:

A seaman suffering emotional distress may seek the remedy unconstrained by limitations such as "zone of danger."[35]

20. Punitive damages and attorney's fees:

Employers who arbitrarily refuse to pay maintenance and cure are subject to an award of punitive damages and, upon reasonable proof of actual cost incurred, an additional award of attorney's fees.[36] [37] Courts, however are divided on the

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[33] *The Iroquois*, 194 U.S. 240 (1904)

[34] *Vaughan v. Atkinson*, 369 U.S. 527, 1962 AMC 1131 (1962).

[35] *West v. Midland Enterprises, Inc.*, 227 F.3d 613 (6th Cir. 2000).

[36] *Vaughan v. Atkinson*, 369 U.S. 527, 1962 AMC 1131 (1962).

[37] *Kopczynski v. The Jacqueline*, 742 F.2d 555, 1985 AMC 769 (9th Cir. 1984).

survival of this doctrine, after the Supreme Courts decision in *Miles v. Apex Marine Corp*, 111 S. Ct 317 (1990).[38]

21. Employer's Duty Includes Pre-payment / Guarantee

An employer must take all reasonable steps to ensure that required cure is provided, including making arrangements to pre-pay or guarantee the costs associated with surgery.[39]

[38] *Atlantic Sounding Co., Inc., Weeks Marine, Inc., v. Edgar L. Townsend, et al*, 2007 WL 2385928 (C.A. 11 (Fla.)).

[39] *Weeks Marine, Inc. v. Bowman*, 2006 WL 2178514 (E.D. LA, 2006)

Atlantic Sounding Co. Inc. v. Townsend
C.A.11 (Fla.),2007.
Only the Westlaw citation is currently available.
United States Court of Appeals,Eleventh Circuit.
ATLANTIC SOUNDING CO., INC., Weeks Marine, Inc., Plaintiffs-Counter-Defendants-Appellants,
v.
Edgar L. TOWNSEND, Defendant-Counter-Claimant-Appellee,
Thomas Kimbrough, Defendant.
No. 06-13204.

Aug. 23, 2007.

Background: Employer of injured seaman and owner of vessel on which seaman was working at time of injury sought declaratory judgment as to their obligations with respect to maintenance and cure. Seaman counterclaimed under Jones Act and general maritime law, alleging negligence, unseaworthiness, and arbitrary and willful failure to pay maintenance and cure, and sought punitive damages. The United States District Court for the Middle District of Florida, No. 05-00649-CV-J-HES-HTS,Harvey E. Schlesinger, J., denied plaintiffs' motion to strike punitive damages request, and plaintiffs sought interlocutory appeal.

Holding: The Court of Appeals, Edmondson, Chief Judge, held that in action for maintenance and cure, punitive damages may be awarded upon showing of willful and arbitrary refusal to pay.

Affirmed.

Carnes, Circuit Judge, filed concurring opinion.

[1] Admiralty 16 ⚿117

16 Admiralty
16XII Appeal
16k117 k. Amendments, New Pleadings and Proofs, and Trial of Cause Anew. Most Cited Cases
Whether punitive damages could be recovered in maintenance and cure action was question of law that Court of Appeals reviewed de novo.

[2] Courts 106 ⚿90(2)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
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106k90(2) k. Number of Judges Concurring in Opinion, and Opinion by Divided Court. Most Cited Cases
Panel of Court of Appeals may depart from earlier panel's decision only when intervening United States Supreme Court decision is clearly on point.

[3] Seamen 348 ⚿11(9)

348 Seamen
348k11 Medical Treatment and Maintenance of Disabled Seamen
348k11(9) k. Actions. Most Cited Cases
In action for maintenance and cure, both reasonable attorney fees and punitive damages may be legally awarded upon showing of shipowner's willful and arbitrary refusal to pay maintenance and cure.

[4] Death 117 ⚿88

117 Death
117III Actions for Causing Death
117III(H) Damages or Compensation
117k80 Elements of Compensation
117k88 k. Loss of Society. Most Cited Cases
There is no recovery for loss of society in general maritime action for wrongful death of Jones Act seaman. 46 App.U.S.C. § 688.

David W. McCreadie, Eddie G. Godwin, Michael Kestenbaum, Lau, Lane, Pieper, Conley & McCreadie, P.A., Tampa, FL, for Plaintiffs-Counter-Defendants-Appellants.
Gerard Joseph Sullivan, Jr., Sullivan & Co., Jacksonville, FL, for Townsend.

Appeal from the United States District Court for the Middle District of Florida.

Before EDMONDSON, Chief Judge, and CARNES and FAY, Circuit Judges.

EDMONDSON, Chief Judge:

***1** In this interlocutory appeal, Plaintiffs-Appellants Atlantic Sounding Co., Inc., and Weeks Marine, Inc. (" Plaintiffs") appeal the district court's denial of Plaintiffs' motion to strike Defendant-Appellee Edgar L. Townsend's (" Defendant") request for punitive damages. The district court concluded that it was bound by our prior panel decision in *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187 (11th Cir.1987), which permits a seaman to recover punitive damages when an employer arbitrarily and willfully refuses to pay maintenance and cure. Plaintiffs contend that *Hines* was abrogated by *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990), in which the Supreme Court concluded that recovery for non-pecuniary loss in the wrongful death of a seaman was not available under general maritime law. We conclude that our prior decision in *Hines* remains binding law in this Circuit; therefore, we affirm.

On 5 July 2005, Defendant, a seaman and crew member of the Motor Tug Thomas, allegedly slipped and landed shoulder first on the steel deck of the vessel, injuring his shoulder and clavicle. According to Defendant, Plaintiffs advised him that they would not provide him with maintenance and cure, which covers medical care, a living allowance, and wages for seamen who become ill or are injured while serving aboard a vessel.[FN1] Plaintiffs then filed this suit for declaratory relief on the question of their obligations in this matter.

Two days later, Defendant filed suit against Plaintiffs pursuant to the Jones Act, 46 U.S.C. § 688, and general maritime law, alleging negligence, unseaworthiness, arbitrary and willful failure to pay maintenance and cure, and wrongful termination. He then filed the same claims as counterclaims to the declaratory judgment action and sought punitive damages on his maintenance and cure claim. The district court later consolidated the two actions.

Plaintiffs moved to strike or to dismiss Defendant's request for punitive damages. Plaintiffs contended that, under *Miles*, neither the Jones Act nor general maritime law provides a cause of action against an employer for non-pecuniary damages. The district court denied Plaintiffs' motion, concluding that it was bound by our rule in *Hines*. The district court later denied Plaintiffs' motion for reconsideration of the issue, but certified the question for review on interlocutory appeal.

[1] Whether punitive damages may be recovered in maintenance and cure actions is a question of law that we review *de novo*. *See Tucker v. Fearn*, 333 F.3d 1216, 1218 n. 2 (11th Cir.2003). The central question here is whether we may depart from our prior ruling in *Hines*, based on the Supreme Court's intervening decision in *Miles*; we conclude that we may not.

***2** [2] Under our prior panel precedent rule, a later panel may depart from an earlier panel's decision only when the intervening Supreme Court decision is " clearly on point." *Garrett v. Univ. of Ala. at Birmingham Bd. of Trustees*, 344 F.3d 1288, 1290-92 (11th Cir.2003) (concluding that an intervening Supreme Court decision did not " implicitly overrule" a prior circuit decision because the cases dealt with different issues and were not " clearly inconsistent"). The Supreme Court reminds us that " [t]here is, of course, an important difference between the holding in a case and the reasoning that supports that holding." *Crawford-El v. Britton*, 523 U.S. 574, 118 S.Ct. 1584, 1590, 140 L.Ed.2d 759 (1998). So, that the reasoning of an intervening high court decision is at odds with that of our prior decision is no basis for a panel to depart from our prior decision. As we have stated, " [o]bedience to a Supreme Court decision is one thing, extrapolating from its implications a holding on an issue that was not before that Court in order to upend settled circuit law is another thing." *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, 475 F.3d 1228, 1230 (11th Cir.2007) (concluding that the Supreme Court's determination that the time requirement in Fed.R.Crim.P. 33 was not jurisdictional did not " relieve[ ] us from the obligation to follow our prior panel decisions holding that the requirements of Appellate Rule 5 are jurisdictional"); *see also Smith v. GTE Corp.*, 236 F.3d 1292, 1303 (11th Cir.2001)(" [W]e categorically reject any exception to the prior panel precedent rule based upon a perceived defect in the prior panel's reasoning or analysis as it relates to the law in existence at that time."); *Fla. League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 462 (11th Cir.1996) (" [W]e are not at liberty to disregard binding case law that is so closely on point and has been only weakened, rather than directly overruled, by the Supreme Court.").

[3] In *Hines*, a panel of this Court determined that, in an action for maintenance and cure, " both reasonable attorney's fees and punitive damages may be legally awarded in a proper case" -that is, upon a showing of a shipowner's willful and arbitrary refusal to pay

maintenance and cure. *Hines,* 820 F.2d at 1189. In reaching this conclusion, we relied mainly on four cases: *Vaughan v. Atkinson,* 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962); *Complaint of Merry Shipping, Inc.,* 650 F.2d 622 (5th Cir. Unit B 1981); *Holmes v. J. Ray McDermott & Co.,* 734 F.2d 1110 (5th Cir.1984); and *Robinson v. Pocahontas, Inc.,* 477 F.2d 1048 (1st Cir.1973). We started with the proposition that *Vaughan* " permitted a seaman to recover reasonable counsel fees when the shipowner's default in the duty to provide maintenance and cure was willful and persistent." *Hines,* 820 F.2d at 1189.[FN2] We then noted that we had previously concluded in *Merry Shipping* that " punitive damages [were] recoverable under general maritime law upon a showing of a shipowner's willful and wanton misconduct in a death action." *Id.* And we noted that the Fifth Circuit had extended the *Merry Shipping* rule to maintenance and cure actions in *Holmes* and that the First Circuit also allowed punitive damages in similar circumstances. *Id.* While stating that *Vaughan* was not dispositive because it considered only attorney's fees, we decided to follow the Fifth Circuit in adopting the reasoning of *Merry Shipping* and extending *Vaughan*'s rule to punitive damages in maintenance and cure actions. *Id.*

[4] Three years later in *Miles,* the Supreme Court " conclude[d] that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman." *Miles,* 111 S.Ct. at 326. In reaching this conclusion, the Court made this observation:

***3** We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress.

Id. at 323. Then, taking note that neither the Jones Act nor the Death on the High Seas Act (" DOHSA"), 46 U.S.C. §§ 761, 762-both of which provide causes of action for the wrongful death of a seaman-permits the recovery of non-pecuniary losses, such as loss of society, the Court stated that " [i]t would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence." *Id.* at 326. Therefore, the Court denied the recovery sought and " restore[d] a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law." *Id.*

Plaintiffs argue that " [t]he *Miles* uniformity principle dictates that all subsequent courts determining the availability of damages in a maritime case must provide for uniform results in similar factual settings, regardless of whether the action is brought pursuant to the Jones Act, DOHSA, or general maritime law." Under this principle, Plaintiffs reason, Defendant cannot recover punitive damages for a general maritime maintenance and cure cause of action because he would not be able to recover punitive damages-which are non-pecuniary in nature-under the Jones Act. But this argument can only be based on the reasoning of the *Miles* opinion, not on the *Miles* decision: its holding. *Miles* says and-more important-decides nothing about maintenance and cure actions or punitive damages. *See Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 399, 5 L.Ed. 257 (1821) (Marshall, C.J.) (" [G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.") For this reason, the *Miles* decision provides no basis for this panel to depart from *Hines* under our prior panel precedent rule. *See Guevara v. Maritime Overseas Corp.,* 34 F.3d 1279, 1283 (5th Cir.1994), *rev'd in part on reh'g,* 59 F.3d 1496 (1995) (" Maritime's argument that *Miles* abrogates this Circuit's rule [announced in *Holmes*] permitting the recovery of punitive damages in maintenance and cure cases obviously cannot rest upon the specific holding in *Miles*.... *Miles* did not involve maintenance and cure or punitive damages."); *Glynn v. Roy Al Boat Mgmt. Corp.,* 57 F.3d 1495, 1503 (9th Cir.1995) (" Because *Miles* did not consider the availability of punitive damages, and was not faced with a claim for maintenance and cure that has no statutory analog, it does not directly control the question of whether punitive damages are available for the willful failure to pay maintenance.").[FN3] Therefore, the district court did not err in following *Hines*-the law of this Circuit-and in denying Plaintiffs' motion to strike Defendant's request for punitive damages.

AFFIRMED.

CARNES, Circuit Judge, concurring:
***4** I join Chief Judge Edmondson's opinion in its entirety. For the reasons it explains and on the basis of the decisions it cites, we are obligated to follow our prior precedent in *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187 (11th Cir.1987). We must follow *Hines*' specific holding that punitive damages are available where there is a willful and persistent failure to pay maintenance and cure, 820 F.2d at 1189-90, even though this Court might have decided that issue differently if *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990), had been available at the time it first arose.

The prior panel precedent rule is a fundamental ground rule that embodies the principle of adherence to precedent. It promotes predictability of decisions and stability of the law, it helps keep the precedential peace among the judges of this Court, and it allows us to move on once an issue has been decided. Without the rule every sitting of this court would be a series of do-overs, the judicial equivalent of the movie " Groundhog Day." While endlessly recurring fresh starts is an entertaining premise for a romantic comedy, it would not be a good way to run a multi-member court that sits in panels. As a panel, we must follow our holding in *Hines* instead of any inferences we may draw from the Supreme Court's reasoning in deciding a different issue in *Miles* because the prior precedent rule requires that we do so, and we take that rule seriously.

At the same time, of course, we are obligated to take Supreme Court decisions seriously, very seriously. Our obligation to do so flows from the constitutional plan of " one supreme Court, and ... such inferior Courts as the Congress may from time to time ordain." U.S. Const. Art. III, § 1; *see Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir.2006) (" We have always believed that when the Founders penned Article III's reference to the judicial power being vested ' in one supreme Court and in such inferior Courts' as Congress may establish, they used ' supreme' and ' inferior' as contrasting adjectives, with us being on the short end of the contrast." (citation omitted)), *cert. denied*, --- U.S. ----, 127 S.Ct. 1126, 166 L.Ed.2d 897 (2007).

The duty of a later panel of this Court to follow an earlier one's decision ends when that decision conflicts with the holding of a later Supreme Court decision. If *Miles* had held that punitive damages were not available for the willful failure to pay maintenance and cure, we certainly would follow that holding instead of our contrary one in *Hines*, even if the *Miles* opinion did not mention the *Hines* decision. *See In re Provenzano*, 215 F.3d 1233, 1235 (11th Cir.2000); *Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir.1997); *United States v. Hogan*, 986 F.2d 1364, 1369 (11th Cir.1993). But *Miles* held nothing about maintenance and cure or punitive damages. It addressed the different issue of whether damages for loss of society are recoverable in a general maritime cause of action for the wrongful death of a seaman, deciding that they were not. 498 U.S. at 37, 111 S.Ct. at 328.

The contention of the appellants in this case is not that the *Miles* holding is contrary to the *Hines* holding, but that the reasoning the Supreme Court used to reach its holding in *Miles*, 498 U.S. at 30-33, 111 S.Ct. at 324-26, is inconsistent with the holding in *Hines*, 820 F.2d at 1189-90. The argument does not pit holding against holding, but reasoning against holding. The broader question this argument presents is whether, and if so when, a panel of this Court may vary from a specific holding of an earlier one based on the reasoning the Supreme Court used to reach a later decision on a different issue.

***5** That question is not particularly difficult in this case because even if there is some tension between the two, it is far from clear that *Miles*' reasoning conflicts with *Hines*' holding. At least a half dozen courts have held that *Miles* does not compel the conclusion that punitive damages are unavailable in maintenance and cure cases. *See Glynn v. Roy Al Boat Mgmt. Corp.*, 57 F.3d 1495, 1503 (9th Cir.1995) (concluding that *Miles* " does not directly control the question of whether punitive damages are available for the willful failure to pay maintenance" but deciding that punitive damages are unavailable for another reason); *Smith v. MAR, Inc.*, 877 F.Supp. 62, 67 (D.R.I.1995) (noting that *Miles* has not stated that punitive damages are unavailable in a claim for maintenance and cure," and concluding that " plaintiff's claim for punitive damages for the agent's arbitrary and willful conduct in failing to pay maintenance and cure is a viable claim post *Miles*"); *White v. Am. River Transp. Co.*, 853 F.Supp. 300, 301 (S.D.Ill.1993) (" As a purely judicial remedy, maintenance and cure has no statutory counterpart. Consequently, it does not defeat *Miles*' goal of uniformity to permit nonpecuniary damages in conjunction with a claim for maintenance and cure."

); *Ortega v. Oceantrawl, Inc.*, 822 F.Supp. 621, 624 (D.Alaska 1992) (" *Miles* does not extend to preclude a claim for exemplary damages in regard to a claim for maintenance and cure."); *Ridenour v. Holland Am. Line Westours, Inc.*, 806 F.Supp. 910, 911, 913 (W.D.Wash.1992) (concluding that " *Miles* is not dispositive as to the availability of punitive damages for willful withholding of maintenance and cure" and holding that " punitive damages are available in an action for maintenance and cure"); *Anderson v. Texaco, Inc.*, 797 F.Supp. 531, 536 (E.D.La.1992) (concluding that the availability " punitive damages for willful failure to pay maintenance and cure, a firmly rooted general maritime law claim, is unaffected by *Miles* because failure to pay is a contractual claim not reached by any maritime statute").

Other courts have decided differently. *See Guevara v. Mar. Overseas Corp.*, 59 F.3d 1496, 1512 (5th Cir.1995) (en banc) (relying on *Miles* to overrule a prior panel decision and hold that " punitive damages [are] not ... available in any action for maintenance and cure" (emphasis omitted)); *In re J.A.R. Barge Lines, L.P.*, 307 F.Supp.2d 668, 673 (W.D.Pa.2004) (" Under the *Miles* uniformity principle, then, punitive damages are unavailable in maintenance and cure actions under general maritime law."); *Blige v. M/V GEECHEE GIRL*, 180 F.Supp.2d 1349, 1355 (S.D.Ga.2001) (same); *Watters v. Harrah's Ill. Corp.*, 993 F.Supp. 667, 676-77 (N.D.Ill.1998) (citing cases coming down on different sides of the issue, but deciding that " [p]ursuant to the *Miles* uniformity principle, punitive damages are not recoverable in the tort-like maintenance and cure action" and that " punitive damages should not be recoverable in a contract-like maintenance and cure action if they are not recoverable in a tort-like maintenance and cure action"); *Boyd v. Cinmar of Gloucester, Inc.*, 919 F.Supp. 208, 209-10 (E.D.Va.1996) (" extending" the Supreme Court's ruling in *Miles* to bar recovery of punitive damages in maintenance and cure actions).

***6** The bottom line is that courts are divided over whether the reasoning of *Miles* conflicts with a holding that punitive damages are available in maintenance and cure actions. At least where reasonable jurists may disagree about whether a later Supreme Court decision compels a different answer to an issue decided by an earlier panel, later panels should follow the existing circuit precedent. That is the case here.

Of course, even if an intervening Supreme Court decision does not conflict with a prior panel precedent to the extent of overruling it, en banc rehearing may be granted for the purpose of addressing the issue afresh in light of the reasoning or implications of the Supreme Court decision. Whether to do that, however, is a different question.

FN1. In *Flores v. Carnival Cruise Lines*, 47 F.3d 1120, 1127 (11th Cir.1995), we described this kind of cause of action:
The seaman's action for maintenance and cure may be seen as one designed to put the sailor in the same position he would have been had he continued to work: the seaman receives a maintenance remedy, because working seamen normally are housed and fed aboard ship; he recovers payment for medical expenses in the amount necessary to bring him to the maximum cure; and he receives an amount representing his unearned wages for the duration of his voyage or contract period.

FN2. We did, however, acknowledge that it was unclear whether the *Vaughan* majority regarded attorney's fees as an item of compensatory damages or as a punitive measure. *See Hines*, 820 F.2d at 1189.

FN3. Even those courts that have extended *Miles* to factual situations that are more similar to that presented in *Miles* have recognized that they do so under the reasoning, rather than the holding, of the Supreme Court's opinion. *See, e.g., Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 202-03 (1st Cir.1994) (relying on the " rationale" and " analysis" of *Miles* to conclude that seaman who had suffered nonfatal injuries could not recover punitive damages in an unseaworthiness action under general maritime law); *Miller v. Am. President Lines, Ltd.*, 989 F.2d 1450, 1455, 1459 (6th Cir.1993) (concluding that punitive damages are not available in general maritime law unseaworthiness action for wrongful death of a seaman, after stating that *Miles*'s " reasoning, if not its holding, seems to cover the type of damages before us").

C.A.11 (Fla.),2007.
Atlantic Sounding Co. Inc. v. Townsend

--- F.3d ----, 2007 WL 2385928 (C.A.11 (Fla.))

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Weeks Marine, Inc. v. Bowman
E.D.La.,2006.
Only the Westlaw citation is currently available.
United States District Court,E.D. Louisiana.
WEEKS MARINE, INC.
v.
Desmond BOWMAN.
Civil Action No. 04-0009.

July 28, 2006.

James A. Cobb, Jr., Matthew F. Popp, Emmett, Cobb, Waits & Kessenich, John F. Emmett, Emmett, Cobb, Waits & Henning, New Orleans, LA, for Weeks Marine, Inc.
Timothy John Falcon, Falcon Law Firm, Marrero, LA, for Desmond Bowman.

OPINION[FN1]

FN1. Jennifer Griep, a third-year law student at Tulane Law School, assisted with the research and preparation of this decision.HELEN G. BERRIGAN, District Judge.

***1** This matter was tried before the Court without a jury on May 25, 2006, and taken under advisement. In the previous trial on liability, the issues of maintenance and cure and attorney's fees were decided in favor of Defendant/counter-claim Plaintiff Desmond Bowman and the issues of negligence and unseaworthiness were decided in favor of Plaintiff/counter-claim Defendant Weeks Marine ("Weeks") (Rec.Doc.47). Thus, all that remains to be decided is the issue of damages. Bowman contends that he is entitled to the following: 1) maintenance from January 4, 2005 through August 25, 2005, 2) lost wages from January 2004 through December 2005, 3) compensatory damages for the mental anguish Bowman suffered as a result of Weeks's failure to provide maintenance and cure from January 2004 through November 2004, 4) compensatory damages for Weeks's failure to provide maintenance and cure from January 4, 2005 through August 25, 2005, and 5) reasonable attorney's fees. Having considered the testimony and evidence adduced at trial, the record, and the law, the Court finds Bowman is entitled to maintenance from January 4, 2005 through August 25, 2005, compensatory damages for the mental anguish Bowman suffered as a result of Weeks's failure to pay maintenance and cure from January 2004 through November 2004, compensatory damages for Weeks's failure to pay maintenance and prompter cure from January 4, 2005 through August 25, 2005, and reasonable attorney's fees. The request for lost wages from January 2004 through December 2005, however, is denied.

The facts leading to the dispute are set forth in the Court's opinion following the liability phase of this proceeding (Rec.Doc.47) and are not repeated here.

I. Maintenance from January 4, 2005 through August 25, 2005

Under general maritime law, a seaman is entitled to Pmaintenance and cure for injuries that occur in the service of the vessel until he reaches maximum medical improvement. *Breese v. AWI, Inc.*, 823 F.2d 100, 104-05 (5th Cir.1987). At the trial on liability in November, 2004, the Court concluded that Bowman's injuries occurred while in the service of Weeks and that Weeks was therefore obligated to pay Bowman maintenance and cure for the injuries to his shoulder and back. (Rec.Doc.47, pg.8). Despite this order, on January 4, 2005, less than two months later, Weeks terminated maintenance payments to Bowman. (Rec.Doc.79, pg.3). Weeks justified the termination by claiming Bowman failed to mitigate his damages by failing to undergo the recommended surgery. *Id.* This issue arose out of Dr. Seltzer's (Bowman's treating physician) request for prepayment or guarantee of his fee for surgery in the amount of $3700.00. *Id.* Weeks claimed it had no duty to prepay or guarantee payment to Dr. Seltzer and concluded that if Bowman or his attorney's would not provide prepayment to Dr. Seltzer, that Bowman was failing to mitigate his damages and therefore forfeited his right to maintenance and cure. *Id.*

***2** In *Guevara v. Maritime Overseas Corporation,* the Fifth Circuit noted that an employer's obligation to pay maintenance and cure requires the employer to take "all reasonable steps to ensure that a seaman who is injured or ill receives proper care and treatment." 59 F.3d 1496, 1500 (5th Cir.1995). In *Sullivan v. Tropical Tuna,* the United States District Court for the District of Massachusetts noted that "an

injured seaman often will be unable to obtain necessary medical treatment unless he can ... demonstrate the ability to pay." 963 F. Supp 42, 45 (D.Mass.1997). As a result, in that case the court concluded that a shipowner's duty to pay maintenance and cure requires him to guarantee payment prior to the seaman's surgery. *Id.* In *Gorum v. Ensco Offshore Company,* the Eastern District of Louisiana concluded based on *Guevara* and *Sullivan* that the "cure obligation involves taking reasonable steps to assure that [the seaman] receives the recommended surgery, including providing assurance of payment in advance if that is necessary." *Gorum,* 2002 U.S. Dist. LEXIS 21992, at * 29. Thus, the Court finds that Weeks had a duty to prepay or guarantee Dr. Seltzer a reasonable fee.

More importantly, for this issue of maintenance, given the company's refusal to prepay, Bowman cannot be said to have failed to mitigate his damages and thereby forfeit his right to maintenance by delaying surgery. Even if Weeks disputed Dr. Seltzer's fee ("cure"), it was unreasonable for Weeks to terminate maintenance. Generally speaking, if a seaman willfully rejects recommended medical aid, he forfeits his right to maintenance and cure. *Coulter v. Ingram Pipeline, Inc.,* 511 F.2d 735, 737 (5th Cir.1975). However, exceptions exist and the question is "whether there existed any extenuating circumstances which made the appellant's failure to follow the prescribed regimen either reasonable or something less than a willful rejection." *Id.* at 737-38. Such circumstances exist here. Bowman was prepared to receive the recommended surgery when Weeks refused to pay for it. Weeks then terminated Bowman's maintenance which Bowman testified created substantial economic uncertainty. Therefore, Bowman's choice to delay surgery until the situation could be resolved with Weeks was reasonable. Weeks's consistently unreasonable and recalcitrant conduct throughout this entire case more than justified Bowman's hesitation. This finding is bolstered by the fact that once an alternative doctor to perform Bowman's surgery was agreed to by the parties on April 7, 2005, Bowman immediately met with him and subsequently received the surgery upon Weeks's approval. (Joint Bench Book, exhibit 14).

This Court finds that Weeks's termination of maintenance was unreasonable and maintenance payments are owed from January 4, 2005 through August 25, 2005. [FN2]

FN2. The Court considers the issue of the amount of Dr. Seltzer's fee to be a "red herring" insofar as maintenance is concerned. The amount of his fee is relevant to the "cure" aspect of Weeks's obligation but not maintenance. It was patently unreasonable for Weeks to terminate maintenance while the dispute over cure was ongoing.

II. Lost Wages from January 2004 through December 2005

In addition to the maintenance payments, Bowman contends that he is entitled to lost wages from January 2004 through December 2005 in the approximate amount of $80,656. (Rec.Doc.79, pg.12).

***3** In general, seamen have three remedies available to them under general maritime law and statute: an action for maintenance and cure, an action for negligence, and an action for unseaworthiness. *See, e.g., The Osceola,* 189 U.S. 158 (1903). In the instant case, Bowman's claims of negligence and unseaworthiness were denied and only his claim for maintenance and cure was granted. (Rec. Doc 47, pg. 1).

Maintenance and cure payments are typically made up of three components: maintenance, cure, and wages. *The Osceola,* 189 U.S. 158 (1903), *See also Flores v. Carnival Cruise Lines,* 47 F.3d 1120, 1122 (11th Cir.1995). These wages include only those that the seaman would have earned during the remainder of the voyage or, in the alternative, those owed until the contract of employment terminates. *See Farrell v. United States,* 336 U.S. 511 (1949); *Archer v. Trans/Am. Servs., Ltd.,* 834 F.2d 1570 (11th Cir.1988).

Bowman was granted maintenance and cure by the Court and it is undisputed that maintenance was paid at the rate of $20.00 per day. (Rec.Doc.79, pg.11). In the absence of liability on the part of Weeks, (i.e. the lack of negligence or unseaworthiness), Bowman is not able to recover additional lost wages on these grounds. *See Crooks v. United States,* 459 F.2d 631, 633 (9th Cir.1972).

III. Compensatory Damages

Bowman contends that he is entitled to compensatory damages for two distinct harms: mental anguish for Weeks's failure to initially pay maintenance and cure

from January 2004 through November 2004, and damages associated with Weeks's failure to pay maintenance and prompter cure from January 4, 2005 through August 25, 2005.

A. Compensatory Damages for Mental Anguish for Initial Failure to Pay Maintenance and Cure (January 2004 through November 2004)

Bowman contends that he is entitled to mental anguish for Weeks's failure to pay maintenance and cure during the initial phase of this proceeding, specifically from January 2004 until the trial commenced in November 2004.

It has been recognized that when a seaman is injured he is "entitled to redress for his physical injury, including the effects thereof, such as pain, suffering, mental anguish, discomfort, and inconvenience." *Pfeifer v. Jones & Laughlin Steel Corporation,* 678 F.2d 453, 460 (3d Cir.1982), *rev'd on other grounds,* 462 U.S. 523 (1983). In *Schwartz v. Neches-Gulf Marine, Inc.,* the court recognized several cases in which the Fifth Circuit has allowed damages for claims of pain and suffering and mental anguish. 67 F.Supp.2d 698, 701-02 (S.D.Tex.1999). In *Boyle v. Pool Offshore Company,* the Fifth Circuit affirmed an award of damages that included damages for pain and suffering and mental anguish. 893 F.2d 713, 718-19 (5th Cir.1990).

In the instant case, the Court previously found Weeks's behavior delaying maintenance and cure payments, in spite of mounting medical evidence, not only unreasonable but arbitrary and capricious. (Rec.Doc.47, pg.8). Furthermore, Bowman testified that Weeks's refusal to pay maintenance and cure, coupled with his inability to work because of his injured shoulder made him unable to support his family.

***4** As stated in *Pfeifer,* an injured seaman is entitled to redress for his physical injuries and its attendant consequences. 678 F.2d at 460. As a result of Weeks's unreasonable delay in providing Bowman with the maintenance and cure to which he was entitled, he suffered unnecessary physical and mental pain and suffering. Thus, Bowman is entitled to compensatory damages for pain and suffering and mental anguish from January 2004 until November 2004.

B. Compensatory Damages for the Failure to Pay Maintenance and Prompter Cure (January 4, 2005 through August 25, 2005)

Bowman also contends that he is entitled to compensatory damages for Weeks's failure to approve his surgery and the subsequent delay in receiving the procedure, as well as the termination of his maintenance, from January 4, 2005 through August 25, 2005. (Rec.Doc.79, pg.11-12).

If an employer unreasonably denies maintenance and cure, the seaman is entitled to compensatory damages. *Morales v. Garijak,* 829 F.2d 1355, 1358 (5th Cir.1987).

In *Sullivan v. Tropical Tuna,* the District Court for the District of Massachusetts, applying general maritime law, found that Tropical Tuna's one month delay in authorizing payment for the seaman's surgery constituted a willful failure to pay cure. 963 F. Supp at 45. The court awarded Sullivan damages for the physical and mental pain and suffering that he suffered as a result of the delay. *Id.* The court stated that upon receiving the claim for maintenance and cure, Tropical Tuna had the right to investigate and corroborate the claim, but that one month was far longer than they needed to do this and that this breach was therefore unreasonable and willful. *Id.*

In the instant case it was clear from the initial proceeding that there was medical evidence that Bowman needed further medical treatment (i.e. the surgery) and the Court ordered maintenance and cure be provided to Bowman for his injuries. (Rec.Doc.47, pg.8). As noted above, it was Weeks's responsibility to ensure that Bowman received the medical attention needed even if they were required to prepay or guarantee his surgery fee to do so. While the Court does not fault Weeks for questioning Dr. Seltzer's fee, it was not until April 7, 2005, more than three months after they unreasonably ceased maintenance payments, that the parties reached an agreement that Dr. Bostick would treat Bowman. (Rec.Doc.79, pg.3, 7). Even after this agreement was reached, Weeks did not officially approve the surgery with Dr. Bostick until July 20, 2005, more than six months after they ceased maintenance payments. (Joint Bench Book, exhibit 10). Surgery did not commence until August 26, 2005, more than seven months after the surgery was originally to be performed. (Rec.Doc.79, pg.4). Maintenance payments did not resume until the surgery was performed. *Id.*

This was a willful and unreasonable delay.[FN3] Weeks had already conducted an investigation into

Bowman's injuries and this Court had already ordered Weeks to pay maintenance and cure for these injuries. As in *Sullivan,* there was sufficient evidence Bowman's injury occurred on the vessel, there was medical evidence that Bowman needed the surgery and still Weeks unreasonably delayed this surgery for more than seven months.

> FN3. The willfulness and unreasonableness is underscored by Weeks's attempt to negatively influence Dr. Bostick's willingness to perform the surgery by sending him surveillance tapes of Bowman, and by their half-hearted commitment to pay his fees.

***5** Weeks unreasonably withheld Bowman's maintenance and cure and is therefore liable to Bowman for compensatory damages for this failure.

At the time of the damages proceedings, Bowman was thirty years old. He testified that he had worked as a deckhand for various maritime companies for most of his working life prior to his injury. He was pleased to be hired by Weeks Marine because it was a big company and held "good opportunities." He intended to stay with Weeks Marine indefinitely.

At the time of his injury, Bowman was the primary financial support for himself, his girlfriend of six years and his daughter. Subsequent to his injury, he had another child which he testified was unplanned.

With respect to his shoulder injury, Bowman testified that he "wasn't able to do nothing" because his shoulder hurt so much. Weeks Marine presented no evidence or argument to the contrary. As already noted above, the Court finds that Bowman was ready to have surgery as soon as it could be approved and none of the delay in "cure" is attributable to him.

Weeks Marine itself acknowledged that had Bowman had surgery when it was first proposed-in March, 2004, he would have been at maximum medical improvement by July, 2004. (Rec.Doc.83, pg.3). Bowman did not have surgery then as Weeks Marine was refusing him both maintenance and cure at that time.

Bowman testified that during the time he was unable to work his girlfriend, Tracy, supported the family. When asked how that made him feel, he said "I feel bad. I feel like a half man." Since returning to work, he has resumed supporting his family and acknowledged feeling "a lot better."

Bowman was found to be recovered from surgery in December, 2005 and he returned to the workforce in January. He works in construction as a sheetrock finisher. He also testified at trial that he has not applied to work for a towing company or a tug boat company since his medical release five month before.

The Court concludes that Bowman's suffered significant physical pain from his shoulder injury since July, 2004. This pain was severe enough to preclude gainful employment. This pain was also unnecessary. Had Weeks Marine provided cure in March, 2004, when Bowman's surgery was first recommended, he would presumably have reached a level of minimum pain by July, 2004, and returned to the workforce.

Bowman's mental anguish was directly associated with his inability to work and support his family. As noted in the Court's earlier ruling in 2004, the Court finds Bowman to be a credible witness, a hard worker who would work through injuries is possible.

In light of the above, the Court finds that an appropriate compensation for Bowman's pain and suffering, which prevented him from employment, and his mental anguish caused by his inability to financially support his family, is the amount of net earnings he would have made had he had the surgery in March, 2004. The beginning date of such earnings is July 1, 2004 and the end date, August 25, 2005, the date of his surgery.

***6** This assessment of net earnings shall be based on wages as a sheetrock finisher, not a maritime deckhand. Bowman has chosen not to return to the maritime field even though apparently able to do so.

IV. Attorney's Fees

Bowman contends that he is entitled to attorney's fees for Weeks's unreasonable and arbitrary and capricious behavior subsequent to January 4, 2005 pertaining to its failure to pay maintenance and cure (Rec.Doc.79, pg.11-12).

If a shipowner "in failing to pay maintenance and cure, has not only been unreasonable but has been more egregiously at fault, he will be liable for punitive damages and attorney's fees." *Morales,* 829 F.2d at 1358. The court in *Morales* noted that this is an escalating scale of liability and that if the

employer acts unreasonably the seaman is entitled to compensatory damages. *Id.* If the employer is not only unreasonable but also acts callously they are liable for punitive damages and attorney's fees as well.[FN4] *Id.*

FN4. Punitive damages are no long available. *See Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir.1995) (en banc) *cert. denied,* 116 S.Ct. 706 (1996).

Weeks was put on notice in the liability trial that their behavior delaying Bowman's maintenance and cure was not only unreasonable but also arbitrary and capricious. (Rec.Doc.47, pg.8). As a result, the Court found it fit to award attorney's fees for their failure to pay maintenance and cure, in addition to maintenance and cure itself. (Rec.Doc.47, pg.8).

Subsequently, less than two months later Weeks ceased paying Bowman maintenance again on January 4, 2005 and refused to pay the fee of the treating physician he had selected. (Rec.Doc.79, pg.3). It was not until April 7, 2005 that the parties were able to agree to an alternative physician, Dr. Bostick, to perform the surgery. (Rec.Doc.79, pg.3, 7). Although Bowman immediately saw Dr. Bostick on April 21, 2005 and Dr. Bostick recommended surgery and physical therapy for Bowman, Weeks continued to delay. (Joint Bench Book Exhibit 14). It was during this period that Weeks's sent surveillance tapes to Dr. Bostick obviously intended to dissuade him from his opinion that surgery was needed. It was not until July 20, 2005 that Weeks sent a letter expressing their intent to guarantee any surgery performed on Bowman by Dr. Bostick and even that was fraught with conditions. (Joint Bench Book exhibit 10). As a result, there was over a seven-month delay in commencing the surgery, during which no maintenance and cure payments were made.

Given the initial Court finding of arbitrary and capricious behavior, Weeks's continuation of such behavior in conjunction with their unreasonable ceasing of maintenance and cure, the Court finds that Weeks has acted in an arbitrary and capricious manner and is liable for attorney's fees.

Accordingly,

IT IS ORDERED that judgment for damages be entered in the favor of Desmond Bowman for:
1) Maintenance from January 2005 through August 2005;
2) Compensatory damages equivalent to the net wages Bowman would have earned as a sheetrock finisher from July 1, 2004 to August 25, 2005.
*7 3) Attorney's fees.

With respect to maintenance and compensatory damages, the parties shall submit a joint judgment to the Court within 20 days specifying the amount. If the parties cannot agree, each side shall submit motions to the Court addressing the amount of damages within 20 days.

With respect to attorney's fees, the prevailing party shall file a motion before the Magistrate Judge to determine the amount.

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Not Reported in F.Supp.2d, 2006 WL 2178514 (E.D.La.)

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II. Development of the Jones Act

Stewart v. Dutra Constr. Co., 543 U.S. 481 (2005)

SUPREME COURT OF THE UNITED STATES

STEWART
v.
DUTRA CONSTRUCTION CO.

CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 03-814.

Argued: November 1, 2004
Decided: February 22, 2005

As part of a project to extend the Massachusetts Turnpike, respondent Dutra Construction Company dug a trench beneath Boston Harbor using its dredge, the *Super Scoop*, a floating platform with a bucket that removes silt from the ocean floor and dumps it onto adjacent scows. The *Super Scoop* has limited means of self-propulsion, but can navigate short distances by manipulating its anchors and cables. When dredging the trench here, it typically moved once every couple of hours. Petitioner, a marine engineer hired by Dutra to maintain the *Super Scoop*'s mechanical systems, was seriously injured while repairing a scow's engine when the *Super Scoop* and the scow collided. He sued Dutra under the Jones Act, alleging that he was a seaman injured by Dutra's negligence, and under § 5(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905(b), which authorizes covered employees to sue a "vessel" owner as a third party for an injury caused by the owner's negligence. The District Court granted Dutra summary judgment on the Jones Act claim, and the First Circuit affirmed. On remand, the District Court granted Dutra summary judgment on the LHWCA claim. In affirming, the First Circuit noted that Dutra had conceded that the *Super Scoop* was a "vessel" under § 905(b), but found that Dutra's alleged negligence had been committed in its capacity as an employer and not as the vessel's owner.

Held: A dredge is a "vessel" under the LHWCA. Pp. 487-497.

(a) Congress enacted the Jones Act in 1920 to remove the bar to negligence suits by seamen. Although that Act does not define "seaman," the maritime law backdrop at the time it was passed shows that "seaman" is a term of art with an established meaning under general maritime law. The LHWCA, enacted in 1927 to provide scheduled compensation to land-based maritime workers but not to "a master or member of a crew of any vessel," 33 U.S.C. § 902(3)(G), works in tandem with the Jones Act: The Jones Act provides tort remedies to sea-based maritime workers and the LHWCA provides workers' compensation to land-based maritime employees. In *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, and *Chandris, Inc. v. Latsis*, 515 U.S. 347, this Court addressed the relationship a worker must have to a vessel in order to be a "master or member" of its crew. Now

the Court turns to the other **[Page 482]** half of the LHWCA's equation: determining whether a watercraft is a vessel. Pp. 487-488.

(b) The LHWCA did not define "vessel" when enacted, but §§ 1 and 3 of the Revised Statutes of 1873 specified that, in any Act passed after February 25, 1871, "'vessel' includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." The LHWCA is such an Act. Section 3's definition has remained virtually unchanged to the present and continues to supply the default definition of "vessel" throughout the U.S. Code. Section 3 merely codified the meaning "vessel" had acquired in general maritime law. In fact, prior to the passage of the Jones Act and the LHWCA, this Court and lower courts had treated dredges as vessels. By the time those Acts became law in the 1920's, it was settled that § 3 defined "vessel" for their purposes, and that a structure's status as a vessel under § 3 depended on whether the structure was an instrument of naval transportation. See *Ellis v. United States*, 206 U.S. 246, 259. Then as now, dredges served a waterborne transportation function: In performing their work they carried machinery, equipment, and a crew over water. This Court has continued to treat § 3 as defining "vessel" in the LHWCA and to construe § 3 consistently with general maritime law. *Norton v. Warner Co.*, 321 U.S. 565. Pp. 488-492.

(c) *Cope v. Vallette Dry Dock Co.*, 119 U.S. 625, and *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19, did not adopt a definition of vesselhood narrower than § 3. Rather, they made a sensible distinction between watercraft temporarily stationed in a particular location and those permanently anchored to shore or the ocean floor. A watercraft is not capable of being used for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement. By including special-purpose vessels like dredges, § 3 sweeps broadly, but other prerequisites to qualifying for seaman status under the Jones Act provide some limits. A worker seeking such status must prove that his duties contributed to the vessel's function or mission and that his connection to the vessel was substantial in nature and duration. *Chandris, supra*, at 376. Pp. 493-495.

(d) The First Circuit held that the *Super Scoop* is not a "vessel" because its primary purpose is not navigation or commerce and because it was not in actual transit at the time of Stewart's injury. Neither prong of that test is consistent with § 3's text or general maritime law's established meaning of "vessel." Section 3 requires only that a watercraft be "used, or capable of being used, as a means of transportation on water," not that it be used primarily for that purpose. The *Super Scoop* was not only "capable of being used" to transport equipment and **[Page 483]** passengers over water — it was so used. Similarly, requiring a watercraft to be in motion to qualify as a vessel under § 3 is the sort of "snapshot" test rejected in *Chandris*. That a vessel must be "in navigation," *Chandris, supra*, at 373-374, means not that a structure's locomotion at any given moment matters, but that structures may lose their character as vessels if withdrawn from the water for an extended period. The "in navigation" requirement is thus relevant to whether a craft is "used, or capable of being used," for naval transportation. The inquiry whether a craft is "used, or capable of being used," for maritime transportation may involve factual issues for a jury, but here no relevant facts were in dispute. Dutra conceded that the *Super Scoop* was only temporarily stationary while the scow was being

repaired; it had not been taken out of service, permanently anchored, or otherwise rendered practically incapable of maritime transport. Finally, Dutra conceded that the *Super Scoop* is a "vessel" under § 905(b), which imposes LHWCA liability on vessel owners for negligence to longshoremen. However, the LHWCA does not meaningfully define the term "vessel" in either § 902(3)(G) or § 905(b), and 1 U.S.C. § 3 defines the term "vessel" throughout the LHWCA. Pp. 495-497.

343 F.3d 10, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which all other Members joined, except REHNQUIST, C. J., who took no part in the decision of the case.

David B. Kaplan argued the cause for petitioner. With him on the briefs were *Thomas M. Bond, David W. Robertson*, and *Michael F. Sturley.*

Lisa S. Blatt argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were former *Solicitor General Olson, Deputy Solicitor General Hungar, Howard M. Radzely, Allen H. Feldman*, and *Mark S. Flynn.*

Frederick E. Connelly, Jr., argued the cause for respondent. With him on the brief were *Harvey Weiner* and *John J. O'Connor.*[*] **[Page 484]**

JUSTICE THOMAS delivered the opinion of the Court.

The question in this case is whether a dredge is a "vessel" under § 2(3)(G) of (pt. 2) the Longshore and Harbor Workers' Compensation Act (LHWCA), 44 Stat., pt. 2 p. 1425, as added by § 2(a) of Pub. L. 98-426, 33 U.S.C. § 90(3)(G). We hold that it is.

I

As part of Boston's Central Artery/Tunnel Project, or "Big Dig," the Commonwealth of Massachusetts undertook to extend the Massachusetts Turnpike through a tunnel running beneath South Boston and Boston Harbor to Logan Airport. The Commonwealth employed respondent Dutra Construction Company to assist in that undertaking. At the time, Dutra owned the world's largest dredge, the *Super Scoop*, which was capable of digging the 50-foot-deep, 100-foot-wide, three-quarter-mile-long trench beneath Boston Harbor that is now the Ted Williams Tunnel.

The *Super Scoop* is a massive floating platform from which a clamshell bucket is suspended beneath the water. The bucket removes silt from the ocean floor and dumps the sediment onto one of two scows that float alongside the dredge. The *Super Scoop* has certain characteristics common to seagoing vessels, such as a captain and crew, navigational lights, ballast tanks, and a crew dining area. But it lacks others. Most conspicuously, the *Super Scoop* has only limited means of self-propulsion. It is moved long distances by tugboat. (To work on the Big Dig, it was towed from its home base in California through

the Panama Canal and up the eastern seaboard to Boston Harbor.) It navigates short distances by manipulating its anchors and cables. When dredging the **[Page 485]** Boston Harbor trench, it typically moved in this way once every couple of hours, covering a distance of 30-to-50 feet each time.

Dutra hired petitioner Willard Stewart, a marine engineer, to maintain the mechanical systems on the *Super Scoop* during its dredging of the harbor. At the time of Stewart's accident, the *Super Scoop* lay idle because one of its scows, *Scow No. 4*, had suffered an engine malfunction and the other was at sea. Stewart was on board *Scow No. 4*, feeding wires through an open hatch located about 10 feet above the engine area. While Stewart was perched beside the hatch, the *Super Scoop* used its bucket to move the scow. In the process, the scow collided with the *Super Scoop*, causing a jolt that plunged Stewart headfirst through the hatch to the deck below. He was seriously injured.

Stewart sued Dutra in the United States District Court for the District of Massachusetts under the Jones Act, 38 Stat. 1185, as amended, 41 Stat. 1007 and 96 Stat. 1955, 46 U.S.C. App. § 688(a), alleging that he was a seaman injured by Dutra's negligence. He also filed an alternative claim under § 5(b) of the LHWCA, 33 U.S.C. § 905(b), which authorizes covered employees to sue a "vessel" owner as a third party for an injury caused by the owner's negligence.

Dutra moved for summary judgment on the Jones Act claim, arguing that Stewart was not a seaman. The company acknowledged that Stewart was "a member of the *Super Scoop*'s crew," 230 F.3d 461, 466 (CA1 2000); that he spent "[n]inety-nine percent of his time while on the job" aboard the *Super Scoop*, App. 20 (Defendant's Memorandum in Support of Summary Judgment); and that his "duties contributed to the function" of the *Super Scoop, id.*, at 32. Dutra argued only that the *Super Scoop* was not a vessel for purposes of the Jones Act. Dutra pointed to the Court of Appeals' en banc decision in *DiGiovanni v. Traylor Brothers, Inc.*, 959 F.2d 1119 (CA1 1992), which held that "if a **[Page 486]** barge . . . or other float's purpose or primary business is *not* navigation or commerce, then workers assigned thereto for its shore enterprise are to be considered seamen only when it is in actual navigation or transit" at the time of the plaintiff's injury. *Id.*, at 1123 (internal quotation marks omitted). The District Court granted summary judgment to Dutra, because the *Super Scoop*'s primary purpose was dredging rather than transportation and because it was stationary at the time of Stewart's injury.

On interlocutory appeal, the Court of Appeals affirmed, concluding that it too was bound by *DiGiovanni*. 230 F.3d, at 467-468. The court reasoned that the *Super Scoop*'s primary function was construction and that "[a]ny navigation or transportation that may be required is incidental to this primary function." *Id.*, at 468. The court also concluded that the scow's movement at the time of the accident did not help Stewart, because his status as a seaman depended on the movement of the *Super Scoop* (which was stationary) rather than the scow. *Id.*, at 469.

On remand, the District Court granted summary judgment in favor of Dutra on Stewart's alternative claim that Dutra was liable for negligence as an owner of a "vessel" under the LHWCA, 33 U.S.C. § 905(b). The Court of Appeals again affirmed. It noted that Dutra had conceded that the *Super Scoop* was a "vessel" for purposes of § 905(b), explaining that "the LHWCA's definition of 'vessel' is 'significantly more inclusive than that used for evaluating seaman status under the Jones Act.'" 343 F.3d 10, 13 (CA1

2003) (quoting *Morehead v. Atkinson-Kiewit, J/V*, 97 F.3d 603, 607 (CA1 1996) (en banc)). The Court of Appeals nonetheless agreed with the District Court's conclusion that Dutra's alleged negligence was committed in its capacity as an employer rather than as owner of the vessel under § 905(b).

We granted certiorari to resolve confusion over how to determine whether a watercraft is a "vessel" for purposes of the LHWCA. 540 U.S. 1177 (2004). **[Page 487]**

II

Prior to the passage of the Jones Act, general maritime law usually entitled a seaman who fell sick or was injured both to maintenance and cure (or the right to be cared for and paid wages during the voyage, see, *e.g., Harden v. Gordon*, 11 F. Cas. 480, 482-483 (No. 6,047) (CC Me. 1823) (Story, J.)), and to damages for any "injuries received . . . in consequence of the unseaworthiness of the ship," *The Osceola*, 189 U.S. 158, 175 (1903). Suits against shipowners for negligence, however, were barred. Courts presumed that the seaman, in signing articles of employment for the voyage, had assumed the risks of his occupation; thus a seaman was "not allowed to recover an indemnity for the negligence of the master, or any member of the crew." *Ibid.*

Congress enacted the Jones Act in 1920 to remove this bar to negligence suits by seamen. See *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995). Specifically, the Jones Act provides:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply." 46 U.S.C. App. § 688(a).

Although the statute is silent on who is a "seaman," both the maritime law backdrop against which Congress enacted the Jones Act and Congress' subsequent enactments provide some guidance.

First, "seaman" is a term of art that had an established meaning under general maritime law. We have thus presumed that when the Jones Act made available negligence remedies to "[a]ny seaman who shall suffer personal injury in the course of his employment," Congress took the term "seaman" as the general maritime law found it. *Chandris,* **[Page 488]** *supra*, at 355 (citing *Warner v. Goltra*, 293 U.S. 155, 159 (1934)); G. Gilmore & C. Black, Law of Admiralty § 6-21, pp. 328-329 (2d ed. 1975).

Second, Congress provided further guidance in 1927 when it enacted the LHWCA, which provides scheduled compensation to land-based maritime workers but which also excepts from its coverage "a master or member of a crew of any vessel." 33 U.S.C. § 902(3)(G). This exception is simply "a refinement of the term 'seaman' in the Jones Act." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 347 (1991). Thus, the Jones Act and the LHWCA are complementary regimes that work in tandem: The Jones Act provides tort remedies to *sea*-based maritime workers, while the LHWCA provides workers' compensation to *land*-based maritime employees. *Ibid.; Swanson v. Marra Brothers, Inc.*, 328 U.S. 1, 6-7 (1946).

Still, discerning the contours of "seaman" status, even with the general maritime law and the LHWCA's language as aids to interpretation, has not been easy. See *Chandris, supra*, at 356. We began clarifying the definition of "seaman" in a pair of cases, *McDermott Int'l, Inc. v. Wilander, supra*, and *Chandris, supra*, that addressed the relationship a worker must have to a vessel in order to be a "master or member" of its crew. We now turn to the other half of the LHWCA's equation: how to determine whether a watercraft is a "vessel."

A

Just as Congress did not define the term "seaman" in the Jones Act,[1] it did not define the term "vessel" in the LHWCA **[Page 489]** itself.[2] However, Congress provided a definition elsewhere. At the time of the LHWCA's enactment, §§ 1 and 3 of the Revised Statutes of 1873 specified:

> "In determining the meaning of the revised statutes, or of any act or resolution of Congress passed subsequent to February twenty-fifth, eighteen hundred and seventy-one, . . . [t]he word 'vessel' includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[3] 18 Stat., pt. 1, p. 1.

Sections 1 and 3 show that, because the LHWCA is an Act of Congress passed after February 25, 1871, the LHWCA's use of the term "vessel" "includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." *Ibid.*

Section 3's definition, repealed and recodified in 1947 as part of the Rules of Construction Act, 1 U.S.C. § 3, has **[Page 490]** remained virtually unchanged from 1873 to the present.[4] Even now, § 3 continues to supply the default definition of "vessel" throughout the U.S. Code, "unless the context indicates otherwise." 1 U.S.C. § 1. The context surrounding the LHWCA's enactment indicates that § 3 defines the term "vessel" for purposes of the LHWCA.

Section 3 merely codified the meaning that the term "vessel" had acquired in general maritime law. See 1 S. Friedell, Benedict on Admiralty § 165 (rev. 7th ed. 2004).In the decades following its enactment, § 3 was regularly used to define the term "vessel" in maritime jurisprudence. Taking only the issue presented here — whether a dredge is a vessel — prior to passage of the Jones Act and the LHWCA, courts often used § 3's definition to conclude that dredges were vessels.[5]

From the very beginning, these courts understood the differences between dredges and more traditional seagoing vessels. Though smaller, the dredges at issue in the earliest cases were essentially the same as the *Super Scoop* here. For instance, the court could have been speaking equally of the *Super Scoop* as of *The Alabama* when it declared:

> "The dredge and scows have no means of propulsion of their own except that the dredge, by the use of anchors, windlass, and rope, is moved for short distances, as required in carrying on the business of dredging. Both **[Page 491]** the dredge and the scows are moved from place to place where they may be employed by being towed, and some of the tows have been for long distances and upon the

> high seas. The dredge and scows are not made for or adapted to the carriage of freight or passengers, and the evidence does not show that, in point of fact, this dredge and scows had ever been so used and employed." *The Alabama*, 19 F. 544, 545 (SD Ala. 1884).

See also *Huismann v. The Pioneer*, 30 F. 206 (EDNY 1886). None of this prevented the court from recognizing that dredges are vessels because they are watercraft with "the capacity to be navigated in and upon the waters." *The Alabama, supra*, at 546; see also *The Pioneer, supra*, at 207; *The International*, 89 F. 484, 485 (CA3 1898).

This Court also treated dredges as vessels prior to the passage of the Jones Act and the LHWCA. It did so in a pair of cases, first implicitly in *The "Virginia Ehrman" and the "Agnese,"* 97 U.S. 309 (1878), and then explicitly in *Ellis v. United States*, 206 U.S. 246 (1907). In *Ellis*, this Court considered, *inter alia*, whether workers aboard various dredges and scows were covered by a federal labor law. Just as in the present case, one of the *Ellis* appellants argued that the dredges at issue were "vessels" within the meaning of Rev. Stat. § 3, now 1 U.S.C. § 3. 206 U.S., at 249. The United States responded that dredges were only vessels, if at all, when in actual navigation as they were "towed from port to port." *Id.*, at 253. Citing § 3, Justice Holmes rejected the Government's argument, stating that "[t]he scows and floating dredges were vessels" that "were within the admiralty jurisdiction of the United States." *Id.*, at 259.

These early cases show that at the time Congress enacted the Jones Act and the LHWCA in the 1920's, it was settled that § 3 defined the term "vessel" for purposes of those statutes. It was also settled that a structure's status as a vessel under § 3 depended on whether the structure was a means of maritime transportation. See R. Hughes, Handbook of **[Page 492]** Admiralty Law § 5, p. 14 (2d ed. 1920). For then, as now, dredges served a waterborne transportation function, since in performing their work they carried machinery, equipment, and crew over water. See, *e.g., Butler v. Ellis*, 45 F.2d 951, 955 (CA4 1930) (finding the vessel status of dredges "sustained by the overwhelming weight of authority"); *The Hurricane*, 2 F.2d 70, 72 (ED Pa. 1924) (expressing "no doubt" that dredges are vessels), aff'd, 9 F.2d 396 (CA3 1925).

This Court's cases have continued to treat § 3 as defining the term "vessel" in the LHWCA, and they have continued to construe § 3's definition in light of the term's established meaning in general maritime law. For instance, in *Norton v. Warner Co.*, 321 U.S. 565 (1944), the Court considered whether a worker on a harbor barge was "a master or member of a crew of any vessel" under the LHWCA, 33 U.S.C. § 902(3)(G). In finding that the "barge [was] a vessel within the meaning of the Act," the Court not only quoted § 3's definition of the term "vessel," but it also cited in support of its holding several earlier cases that had held dredges to be vessels based on the general maritime law. 321 U.S., at 571, and n. 4. This Court therefore confirmed in *Norton* that § 3 defines the term "vessel" in the LHWCA and that § 3 should be construed consistently with the general maritime law. Since *Norton*, this Court has often said that dredges and comparable watercraft qualify as vessels under the Jones Act and the LHWCA.[6] **[Page 493]**

B

Despite this Court's reliance on § 3 in cases like *Ellis* and *Norton*, Dutra argues that the Court has implicitly narrowed § 3's definition. Section 3 says that a "vessel" must be "used, or capable of being used, as a means of transportation on water." 18 Stat., pt. 1, p. 1. In a pair of cases, the Court held that a drydock, *Cope v. Vallette Dry Dock Co.*, 119 U.S. 625, 630 (1887), and a wharfboat attached to the mainland, *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19, 22 (1926), were not vessels under § 3, because they were not *practically* capable of being used to transport people, freight, or cargo from place to place. According to Dutra, *Cope* and *Evansville* adopted a definition of "vessel" narrower than § 3's text.

Dutra misreads *Cope* and *Evansville*. In *Cope*, the plaintiff sought a salvage award for having prevented a drydock from sinking after a steamship collided with it. 119 U.S., at 625-626. At the time of the accident, the drydock, a floating dock used for repairing vessels, was "moored and lying at [the] usual place" it had occupied for the past 20 years. *Id.*, at 626. In those circumstances, the drydock was a "fixed structure" that had been "permanently moored," rather than a vessel that had been temporarily anchored. *Id.*, at 627. *Evansville* involved a wharfboat secured by cables to the mainland. Local water, electricity, and telephone lines all ran from shore to the wharfboat, evincing a "permanent location." 271 U.S., at 22. And the wharfboat, like the drydock in *Cope*, was neither "taken from place to place" nor "used to carry freight from one place to another." 271 U.S., at 22. As in *Cope*, the Court concluded that the wharfboat "was not practically capable of being used as a means of transportation." 271 U.S., at 22.

Cope and *Evansville* did no more than construe § 3 in light of the distinction drawn by the general maritime law between watercraft temporarily stationed in a particular location and those permanently affixed to shore or resting on the **[Page 494]** ocean floor. See, *e.g., The Alabama*, 19 F., at 546 (noting that vessels possess "mobility and [the] capacity to navigate," as distinct from fixed structures like wharves, drydocks, and bridges). Simply put, a watercraft is not "capable of being used" for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement.

This distinction is sensible: A ship and its crew do not move in and out of Jones Act coverage depending on whether the ship is at anchor, docked for loading or unloading, or berthed for minor repairs, in the same way that ships taken permanently out of the water as a practical matter do not remain vessels merely because of the remote possibility that they may one day sail again. See *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 570 (CA5 1995) (floating casino was no longer a vessel where it "was moored to the shore in a semi-permanent or indefinite manner"); *Kathriner v. Unisea, Inc.*, 975 F.2d 657, 660 (CA9 1992) (floating processing plant was no longer a vessel where a "large opening [had been] cut into her hull," rendering her incapable of moving over the water). Even if the general maritime law had not informed the meaning of § 3, its definition would not sweep within its reach an array of fixed structures not commonly thought of as capable of being used for water transport. See, *e.g., Leocal v. Ashcroft*, ante, at 9 ("When interpreting a statute, we must give words their 'ordinary or natural' meaning" (quoting *Smith v. United States*, 508 U.S. 223, 228 (1993))).

Applying § 3 brings within the purview of the Jones Act the sorts of watercraft considered vessels at the time Congress passed the Act. By including special-purpose vessels like dredges, § 3 sweeps

broadly, but the other prerequisites to qualifying for seaman status under the Jones Act provide some limits, notwithstanding § 3's breadth. A maritime worker seeking Jones Act seaman status must also prove that his duties contributed to the vessel's function or mission, **[Page 495]** and that his connection to the vessel was substantial both in nature and duration. *Chandris*, 515 U.S., at 376. Thus, even though the *Super Scoop* is a "vessel," workers injured aboard the *Super Scoop* are eligible for seaman status only if they are "master[s] or member[s]" of its crew.

C

The Court of Appeals, relying on its previous en banc decision in *DiGiovanni v. Traylor Brothers, Inc.*, 959 F.2d 1119 (CA1 1992), held that the *Super Scoop* is not a "vessel" because its primary purpose is not navigation or commerce and because it was not in actual transit at the time of Stewart's injury. 230 F.3d, at 468-469. Neither prong of the Court of Appeals' test is consistent with the text of § 3 or the established meaning of the term "vessel" in general maritime law.

Section 3 requires only that a watercraft be "used, or capable of being used, as a means of transportation on water" to qualify as a vessel. It does not require that a watercraft be used *primarily* for that purpose. See *The Alabama, supra*, at 546; *The International*, 89 F., at 485. As the Court of Appeals recognized, the *Super Scoop*'s "function was to move through Boston Harbor, . . . digging the ocean bottom as it moved." 343 F.3d, at 12. In other words, the *Super Scoop* was not only "capable of being used" to transport equipment and workers over water — it *was* used to transport those things. Indeed, it could not have dug the Ted Williams Tunnel had it been unable to traverse the Boston Harbor, carrying with it workers like Stewart.

Also, a watercraft need not be in motion to qualify as a vessel under § 3. Looking to whether a watercraft is motionless or moving is the sort of "snapshot" test that we rejected in *Chandris*. Just as a worker does not "oscillate back and forth between Jones Act coverage and other remedies depending on the activity in which the worker was engaged while injured," *Chandris*, 515 U.S., at 363, neither does a watercraft pass in and out of Jones Act coverage **[Page 496]** depending on whether it was moving at the time of the accident.

Granted, the Court has sometimes spoken of the requirement that a vessel be "in navigation," *id.*, at 373-374, but never to indicate that a structure's locomotion at any given moment mattered. Rather, the point was that structures may lose their character as vessels if they have been withdrawn from the water for extended periods of time. *Ibid.; Roper v. United States*, 368 U.S. 20, 21, 23 (1961); *West v. United States*, 361 U.S. 118, 122 (1959). The Court did not mean that the "in navigation" requirement stood apart from § 3, such that a "vessel" for purposes of § 3 might nevertheless not be a "vessel in navigation" for purposes of the Jones Act or the LHWCA. See, *e.g., United States v. Templeton*, 378 F.3d 845, 851 (CA8 2004) ("[T]he definition of 'vessel in navigation' under the Jones Act is not as expansive as the general definition of 'vessel'").

Instead, the "in navigation" requirement is an element of the vessel status of a watercraft. It is relevant to whether the craft is "used, or capable of being used" for maritime transportation. A ship long lodged

in a drydock or shipyard can again be put to sea, no less than one permanently moored to shore or the ocean floor can be cut loose and made to sail. The question remains in all cases whether the watercraft's use "as a means of transportation on water" is a practical possibility or merely a theoretical one. *Supra*, at 493. In some cases that inquiry may involve factual issues for the jury, *Chandris, supra*, at 373, but here no relevant facts were in dispute. Dutra conceded that the *Super Scoop* was only temporarily stationary while Stewart and others were repairing the scow; the *Super Scoop* had not been taken out of service, permanently anchored, or otherwise rendered practically incapable of maritime transport.

Finally, although Dutra argues that the *Super Scoop* is not a "vessel" under § 902(3)(G), which is the LHWCA provision that excludes seamen from the Act's coverage, Dutra conceded **[Page 497]** below that the *Super Scoop is* a "vessel" under § 905(b), which is the LHWCA provision that imposes liability on vessel owners for negligence to longshoremen. The concession was necessary because the Court of Appeals had previously held that § 905(b)'s use of the term "vessel" is "'significantly more inclusive than that used for evaluating seaman status under the Jones Act.'" 343 F.3d, at 13 (quoting *Morehead v. Atkinson-Kiewit*, 97 F.3d, at 607). The Court of Appeals' approach is no longer tenable. The LHWCA does not meaningfully define the term "vessel" as it appears in either § 902(3)(G) or § 905(b), see n. 2, *supra*, and 1 U.S.C. § 3 defines the term "vessel" throughout the LHWCA.

III

At the time that Congress enacted the LHWCA and since, Rev. Stat. § 3, now 1 U.S.C. § 3 has defined the term "vessel" in the LHWCA. Under § 3, a "vessel" is any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment. Because the *Super Scoop* was engaged in maritime transportation at the time of Stewart's injury, it was a vessel within the meaning of 1 U.S.C. § 3. Despite the seeming incongruity of grouping dredges alongside more traditional seafaring vessels under the maritime statutes, Congress and the courts have long done precisely that:

> "[I]t seems a stretch of the imagination to class the deck hands of a mud dredge in the quiet waters of a Potomac creek with the bold and skillful mariners who breast the angry waves of the Atlantic; but such and so far-reaching are the principles which underlie the jurisdiction of the courts of admiralty that they adapt themselves to all the new kinds of property and new sets of operatives and new conditions which are brought into existence in the progress of the world." *Saylor v. Taylor*, 77 F. 476, 479 (CA4 1896). **[Page 498]**

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

FOOTNOTES

* Briefs of *amici curiae* urging reversal were filed for the Association of Trial Lawyers of America by *John W. deGravelles* and *David S. Casey, Jr.*; for Diamond Offshore Drilling, Inc., et al. by *James Patrick Cooney*; and for the United Brotherhood of Carpenters and Joiners of America by *John R. Hillsman* and *John T. DeCarlo.*

Briefs of *amici curiae* urging affirmance were filed for the Signal Mutual Indemnity Association by *John J. Walsh*; and for T. W. LaQuay Dredging, Inc., by *Gus David Oppermann V.*

[1] The Shipping Act, 1916, defines the term "vessel" for purposes of the Jones Act. See 46 U.S.C. App. § 801. However, the provision of the Jones Act at issue here, § 688(a), speaks not of "vessels," but of "seamen." In any event, because we have identified a Jones Act "seaman" with reference to the LHWCA's exclusion, see 33 U.S.C. § 902(3)(G) ("a master or member of a crew of any vessel"), it is the LHWCA's use of the term "vessel" that matters. And, as we explain, the context surrounding Congress' enactment of the LHWCA suggests that Rev. Stat. § 3, now 1 U.S.C. § 3 provides the controlling definition of the term "vessel" in the LHWCA.

[2] As part of its 1972 Amendments to the LHWCA, Congress amended the Act with what appears at first blush to be a definition of the term "vessel": "Unless the context requires otherwise, the term 'vessel' means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member." 33 U.S.C. § 902(21). However, Congress enacted this definition in conjunction with the third-party vessel owner provision of § 905(b). Rather than specifying the characteristics of a vessel, § 902(21) instead lists the parties liable for the negligent operation of a vessel. See *McCarthy v. The Bark Peking*, 716 F.2d 130, 133 (CA2 1983) (§ 902(21) is "circular" and "does not provide precise guidance as to what is included within the term 'vessel'").

[3] Congress had used substantially the same definition before, first in an 1866 antismuggling statute, see § 1, 14 Stat. 178, and then in an 1870 statute "provid[ing] for the Relief of sick and disabled Seamen," Ch. CLXIA, 16 Stat. 169 (italics deleted); see *id.*, § 7, at 170..

[4] During the 1947 codification, the hyphen was removed from the word "watercraft." § 3, 61 Stat. 633.

[5] See, *e.g., The Alabama*, 19 F. 544, 546 (SD Ala. 1884) (dredge was a vessel and subject to maritime liens); *Huismann v. The Pioneer*, 30 F. 206, 207 (EDNY 1886) (dredge was a vessel under § 3); *Saylor v. Taylor*, 77 F. 476, 477 (CA4 1896) (dredge was a vessel under § 3, and its workers were seamen); *The International*, 89 F. 484, 484-485 (CA3 1898) (dredge was a vessel under § 3); *Eastern S. S. Corp. v. Great Lakes Dredge & Dock Co.*, 256 F. 497, 500-501 (CA1 1919) (type of dredge called a "drillboat" was a vessel under § 3); *Los Angeles v. United Dredging Co.*, 14 F.2d 364, 365-366 (CA9 1926) (dredge was a vessel under § 3 and its engineers were seamen).

[6] See, *e.g., Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 535, and n. 1 (1995) (indicating that a stationary crane barge was a "vessel" under the Extension of Admiralty Jurisdiction Act); *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 92 (1991) (holding that a jury could reasonably find that floating platforms were "vessels in navigation" under the Jones Act); *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 528-530 (1983) (treating coal barge as a "vessel" under the LHWCA, 33 U.S.C. § 905(b)); cf. *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 372 (1957) (assuming that a dredge was a Jones Act vessel); *id.*, at 375, n. 1 (Harlan, J., dissenting) (same).

THE CHIEF JUSTICE took no part in the decision of this case.

No. 03-814

IN THE
Supreme Court of the United States

OCTOBER TERM 2003

WILLARD STEWART,
Petitioner,

versus

DUTRA CONSTRUCTION CO.,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

David S. Casey, Esq.
1051 31st Street, N.W.
Washington, DC 20007
(202) 965-3500
President, The Association of Trial Lawyers of America

John W. deGravelles, Esq.*
618 Main Street
Baton Rouge, LA 70801
(225) 344-3735
Attorney for Amicus Curiae
**Counsel of Record*

Attorneys for the Amicus Curiae

May __, 2004

QUESTION PRESENTED

What is the legal standard for determining whether a watercraft is a Jones Act vessel?

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of American ("ATLA") respectfully submits this brief as *amicus curiae* in this case. Letters from both parties granting consent to the filing of this brief have been filed with this Court.[1]

ATLA is a voluntary national bar association whose approximately 50,000 lawyer members primarily represent injured plaintiffs in civil actions. The Admiralty Law Section of the Association includes most of the attorneys who specialize in representing plaintiffs in maritime personal injury litigation.

The Jones Act, 46 U.S.C. App. § 688(a), affords a remedy to seamen and their families to seek compensation for injury or death caused during the course of their hazardous work. The issues in this case affect the question of who may qualify as a Jones Act seaman. One of the tenets of ATLA's mission is to preserve the rights of all citizens, including seamen, to legal recourse for injury.

[1] This brief was prepared on behalf of ATLA by its undersigned counsel. It was not authored, in whole or in part, by counsel for any party. No person or entity other than ATLA, or its counsel, made a monetary contribution to the preparation or submission of the brief.

SUMMARY OF ARGUMENT

1. In order to qualify as a seaman under the Jones Act, a worker must have a substantial employment connection to a *vessel* in navigation or an identifiable fleet of such vessels. The Jones Act, 46 U.S.C. App. § 688(a) contains no definition of the word "vessel" and the definition found in the Longshore & Harbor Workers Compensation Act, 33 U.S.C. § 902(21) is of no help. This Court's decisions which fashioned the present test for seaman status do not define the term "vessel." *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995); *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991). The lower courts' decisions on this subject are mired in confusion and contradiction. There is a need for this Court to provide a clear and straightforward definition of the term "vessel" for the purpose of determining seaman status.

2. The test used by the court below denies Jones Act vessel status to special-purpose vessels whose mission is not primarily transportation of passengers or cargo over navigable waters unless that vessel is in transit at the moment of the worker's injury. This test is untenable because:

   A. The artificial distinction it draws between traditional and special-purpose vessels is not supported by logic or by law. There is no principled basis for such a distinction because:

      (1) Maritime law has long recognized that there are "myriad purposes for which ships set to sea," *Wilander, supra* at 344, and the transportation of passengers or cargo over navigable waters is only one of these. Maritime law has long recognized that unconventional as well as traditional vessels

serve the varied purposes of maritime commerce.

(2) There is no meaningful difference between traditional and special-purpose vessels insofar as the connection required between the vessel and the crew which serves her. The crews of both are required to have an employment connection to the vessel that is substantial in both nature and duration. The crew members of both are required to contribute to the mission of the vessel.

(3) There is no meaningful difference in the exposure to marine perils suffered by the crews of traditional and special-purpose vessels.

(4) This Court's prior decisions have consistently held or assumed special-purpose craft to be vessels.

B. The test used by the court below focuses on the circumstances existing at the moment of injury and is therefore the kind of "snapshot" test forbidden by the *Chandris* Court. Thus, the test provides no predictability to employers, workers or insurers as to who, on any given workday, is covered by the Jones Act and who is covered by LHWCA.

3. The definition of the term "vessel" found in 1 USC § 3, when used in conjunction with the other prongs of the seaman status test established in *Chandris*, is an appropriate test for Jones Act vessel status. 1 USC § 3 states: "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation over water."

4. A separate prong of the test for seaman status set out in *Chandris* requires the vessel to be

"in navigation." This Court has made clear that the "in navigation" requirement does not require the vessel to be in transit in order for it to be a vessel. Rather, a vessel is "in navigation" as long as it has not been removed from navigation for such a lengthy period of time that it must be considered out of service. Put another way, a vessel is " in navigation," even if stationary for long periods, as long as it is performing its intended function.

5. A Jones Act vessel is, therefore, any kind of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation. This definition is consistent with this Court's prior decisions; it is clear, straightforward and allows for predictability; it takes into account the great variety of watercraft engaged in maritime commerce and the varied missions in which they participate in maritime commerce; and finally, it serves the underlying policy of the Jones Act.

ARGUMENT

I. THERE IS A NEED FOR A CLEAR AND SIMPLE DEFINITION OF THE TERM "VESSEL"

In its recent decisions addressing the issue of seaman status, this Court has done much to bring clarity and predictability to this difficult area. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991) considered the nature of the work that an individual must do aboard a vessel in order to qualify for the protection of the Jones Act, 46 U.S.C. App. § 688(a). Two starkly different views were presented: that of the Seventh Circuit, which required a worker to aid in the navigation of the vessel in order to be a seaman, *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054 (CA7 1984), *cert. den.*, 469 U.S. 1211 (1985) and that of the Fifth Circuit, which granted seaman status to those whose work contributed broadly to the function or mission of the vessel, *Offshore Co. v. Robison*, 266 F.2d 769 (CA5 1959).

The Court concluded that the Fifth Circuit in *Robison* had "deciphered" this Court's earlier decisions and "... correctly found that ... this Court was no longer requiring that seamen aid in navigation." The Court found that to be a seaman, a worker must merely "contribut[e] to the function of the vessel or the accomplishment of its mission." *Wilander* at 498 U.S. 354-355, quoting *Robison*, 266 F.2d 769 at 779. While the Court emphasized that the employment-related connection to a vessel was the "key to seaman status," it found it unnecessary to further "define this connection in all details." *Wilander, supra* at 355.

Chandris, Inc. v. Latsis, 515 U.S. 347 (1995) presented the Court with the opportunity to elaborate on the nature of that connection. This Court again turned to *Robison* for guidance, quoting Judge Wisdom's formulation of the test for seaman status.

"[T]here is an evidentiary basis for a Jones Act case to go a jury: (1) if there is

> evidence that the injured workman was assigned permanently to a vessel ... or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips."

Chandris, supra at 365-366, quoting *Robison* at 779.

Building upon and refining that formulation, the Court reiterated the requirement that an employee's duties must "contribute to the function of the vessel or the accomplishment of its mission," *Chandris, supra* at 368, quoting *Wilander, supra* at 335, which, in turn, was quoting *Robison, supra* at 779. With respect to the connection requirement, the Court stated: "Second, and most important for our purposes here, a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in both its duration and nature." *Chandris, supra* at 368.

The Court emphasized that the fundamental purpose of the substantial connection requirement is to distinguish between land-based and sea-based employees and to give the added protection of seamen's remedies to those employees who, because they are sea-based, are exposed to marine perils. *Chandris*, *supra* at 368.

Neither *Wilander* nor *Chandris* described the "vessel" to which the worker must have a substantial connection in order to be a seaman. The Jones Act does not define the term "vessel" and the definition of that term found in the LHWCA is tautological.[2] As is documented in Stewart's petition for certiorari, irreconcilable conflict and confusion exist among the various

[2] "Unless the context requires otherwise, the term 'vessel' means any vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner *pro hac vice*, agent, operator, charter [*sic*], or bareboat charterer, master, officer or crew member." LHWCA 33 U.S.C. § 902(21).

courts that have attempted to define this critical term.

Thus, there is a need for this Court to adopt a definition of the term "vessel" that is consistent with its earlier decisions and true to the fundamental purpose of its *Chandris* test: to fairly distinguish between sea-based and land-based workers. This vessel status test should be clear, easy to apply, and provide predictability. It should be consistent with the underlying policy of the Jones Act and consistent with existing statutory definitions of the term. Finally, the test should be broad enough to capture the myriad watercraft which now or in the future will be used in maritime commerce and whose crew members are "sea-based" and thus exposed to marine perils.

II. THE PROPOSED STANDARD FOR A JONES ACT "VESSEL"

The definition of "vessel" found in 1 U.S.C. § 3 in combination with the other prongs of the *Chandris* seaman status test meets these needs and captures the long understood meaning of that term in the general maritime law.

> "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation over water."

1 U.S.C. § 3.

Robison, the landmark Fifth Circuit case utilized and endorsed by this Court in fashioning the *Wilander/Chandris* test for seaman status, also provides guidance for defining the term "vessel" and support for the adoption of 1 U.S.C. § 3 as the appropriate standard. Robison was injured while working as a roughneck aboard a mobile oil drilling rig located in the Gulf of Mexico. The drilling barge, Offshore No. 55, was fitted with retractable legs so that it could be

towed into position by tugboats, where the legs would then be lowered to the ocean floor and the rig raised above water level by hydraulic jacks. The rig floor would then be used as a drilling platform. The rig was in this position at the time of Robison's accident.

The defendant argued, *inter alia*, that Offshore No. 55 was not a vessel (*Robison, supra* at 773 n.3). Judge Wisdom first reviewed *Gianfala v. Texas Company*, 350 U.S. 879 (1955) (*per curiam*) and the four decisions cited therein.[3] He concluded:

> "There are common denominators in *Gianfala*, *Basset*, *Summerlin*, *Wilkes*, and *Gahagan* decisions [sic]. (1) The claimants are not ordinarily thought of as 'seamen' aboard 'primarily in aid of navigation,' although they may serve the vessel in the sense that the work they perform fits in with the function the vessel serves. *** (2) The 'vessels' were not conventional vessels but 'special-purpose' structures that in one case was on the ocean floor. In other words, under the Jones Act a vessel may mean more than a means of transport on water."

Robison, supra at 776; emphasis added.

After then reviewing a series of other Supreme Court decisions including *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370 (1957); *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1948); and *Butler v. Whiteman*, 356 U.S. 271 (1958), the court issued its test for seaman status quoted above. In that test the court included within the term vessel "special purpose structures not usually employed as a means of transport by water but designed to float on water." *Robison, supra* at 779. The court in *Robison* recognized that there are many kinds of vessels which serve maritime commerce in a variety of ways and that the transportation of passengers and cargo is only one. In *Wilander* this Court agreed, noting that there are "myriad purposes for which ships set to sea." 498 U.S. at 344. The broad language of 1 U.S.C. § 3 gives courts the

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[3] *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940); *Summerlin v. Massman Const. Co.*, 199 F.2d 715 (CA4 1952); *Wilkes v. Mississippi River Sand & Gravel Co.*, 202 F.2d 383 (CA6 1953); *Gahagan Const. Corp. v. Armao*, 165 F.2d 301 (CA1 1948).

necessary flexibility to appropriately consider the vast array of circumstances under which different kinds of watercraft do their work.

The vessel status test used by the court below, on the other hand, draws an artificial distinction between craft whose primary purpose is to transport passengers or cargo over water and those special-purpose vessels which serve some other purpose. *Stewart v. Dutra Construction Company, Inc.*, 230 F.3d 461, 476 (CA1 2000) (*Stewart I*), relying on *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119 (CA1 1992) (*en banc*). According to this test, a vessel which does not have transportation as its primary function is a Jones Act vessel only if it is under way at the time plaintiff is injured. *DiGiovanni, id.* at 1123. There is no legitimate support in logic or in law for such a distinction.

Both traditional and special-purpose craft must, at some point, move over water to perform their missions, but there are also times in the normal operations of both kinds of craft when they are stationary.[4] A Jones Act vessel does not lose its status as such merely because it is stationary.[5] While one prong of the *Chandris* test requires a vessel to be "in navigation," 515 U.S. at 368, this Court made it clear that the phrase is not meant in a narrowly literal sense. It does not require the vessel to be under way; a vessel is "in navigation" unless it has ceased to do its normal work for such a lengthy period of time that it must be considered out of service. *Id.* at 372-376. Put another way, a vessel remains "in navigation" even if not under way, as long as it is

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[4] The times and circumstances during which these craft are stationary vary widely. For cargo vessels, for example, it may be as short as hours while the vessel is docked or as long as months while the vessel undergoes repairs. For a drilling vessel, it may be as short as a few days while it is re-provisioned between jobs, or weeks while it performs its drilling operations.

[5] *See* Robert Force and Martin J. Norris, THE LAW OF SEAMEN 5th Ed. (2003), Ch. 2:11 and cases collected therein.

performing its normal and expected functions on navigable waters.[6]

The vessel in *Chandris* had been placed in dry dock for a six-month refurbishment. *Id.* at 351. The district court instructed the jury that, in considering Latsis' time serving aboard the vessel, it was not to consider the time he served during these six months "because during that period of time [the vessel] was out of navigation." *Id.* at 372-373. This Court found the instruction improper and remanded for a trial on the issue of whether the six-month refurbishment was of sufficient length and the repairs of significant magnitude to have removed the vessel from navigation. This Court concluded that the "inquiry whether a vessel is or is not 'in navigation' for Jones Act purposes is a fact-intensive question that is normally for the jury and not the court to decide." *Id.* at 373.

In respect to the other prongs of the *Chandris* test, the distinction drawn in *Stewart I* and *DiGiovanni* between traditional and special-purpose vessels is equally false. The crews of both kinds of vessels must have substantial connections to their craft. The crews of both are exposed to marine perils whether or not the craft is under way. Indeed, as pointed out by the court in *Robison*, the crews of special-purpose vessels sometimes suffer greater risks than their "blue-water" counterparts.

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[6] A vessel is in navigation as long as it is performing its work on water, whatever that work is, and retains that status until and unless it is "withdrawn from navigation" [*Gonzales v. United States Shipping Board*, 3 F.2d 171 (E.D.N.Y. 1924) or "taken out of service," *Wayne Construction, Inc. v. Lenard*, 56 F.3d 75 (table), 1995 WL 309188 at *3 n. 2 (CA9 1994) (unpublished); *Leonard v. Transoceanic Sedco Forex*, 189 F.Supp.2d 627, 629 (S.D. Tx. 2002) (vessel "is in navigation if it is engaged in its expected duties on navigable waters)]. *See also Johnson v. John F. Beasley Constr. Co.*, 742 F.2d 1054, 1063-64 (CA7 1984) (defining "in navigation" as "engaged as an instrument of commerce or transportation on navigable water"); *Fuller v. Pacific Gulf Marine, Inc.*, 1987 WL 17234 at *3, 1998 AMC 470 (E.D.Pa. 1987) (same); *Rogers v. M/V Ralph Bollinger*, 279 F.Supp. 92, 94-95 (E.D.La. 1968) (same); *cf. Lewis v. Roland E. Trego & Sons*, 501 F.2d 372, 374 (CA4 1974) (holding that a construction barge was in navigation "while moored in navigable water to give the workmen access to offshore piling"); *Davis v. Sedco Forex*, 660 F.Supp. 85, 86 (E.D.Pa. 1987) (holding that a floatable oil drilling rig was in navigation while stationary in drilling mode).

> "Many of the Jones Act seamen on these [drilling] vessels share the same marine risks to which all aboard are subject. And in many instances Jones Act seamen are exposed to more hazards than are blue-water sailors. They run the risk of top-heavy drilling barges collapsing. They run all the risks incident to oil drilling."

Robison, supra at 780.

These marine risks are present whether the special purpose craft is stationary or under way. The facts in *Stewart I* dramatically illustrate the point. On the day Stewart was injured, the vessel "lay idle." *Stewart I*, 230 F.2d at 464. As Stewart attempted repairs on one of the scows attending the dredge, the scow allided with the dredge causing Stewart to fall headfirst to a deck below. *Id.* at 465.[7]

Thus, in terms of applying the seaman status test set out in *Chandris*, there is no principled basis for distinguishing between vessels whose primary purpose is transporting passengers or cargo and non-traditional vessels which serve some other purpose. A special-purpose vessel, like a traditional vessel, does not lose its Jones Act vessel status merely because it is stationary. A craft, be it traditional or special-purpose, is a Jones Act vessel if it is "used, or

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[7] The jurisprudence is replete with cases where seamen have been injured by maritime perils while working on vessels which have been secured. *See, e.g.*: *McFarland v. Justiss Oil Co., Inc.*, 526 So.2d 1206 (La.App. 1988), where plaintiff fell into the water from a pontoon barge attached to an oil rig; *Miller v. International Diving and Consulting Services, Inc.*, 669 So.2d 1246 (La.App.1996), where the plaintiff diver was injured when the ladder he was using to board a pipe-laying barge shifted and twisted; *Melancon v. I.M.C. Drilling Mud*, 282 So.2d 532 (La.App. 1973), where the plaintiff was crushed while trying to transfer large metal containers onto an oil rig from a moored vessel; *Feliciano v. Texaco, Inc.*, 2002 WL 1159700 (E.D.La. 2002), where plaintiff, a crane operator on a spud barge, was injured when a tugboat tied to the barge to help with operations moved prematurely, causing the line to trap plaintiff's leg.

capable of being used, as a means of transportation over water" (1 U.S.C. § 3).

III. THE PROPOSED TEST IS CONSISTENT WITH SUPREME COURT JURISPRUDENCE

The proposed test is entirely consistent with this Court's cases which, in a variety of circumstances, either held or assumed special-purpose craft to be vessels. *Jerome B. Grubart, Inc. v. Great Lakes Dredge and Dock Co.*, 513 U.S. 527 (1995) considered whether admiralty jurisdiction existed under the Admiralty Extension Act (AEA), 46 U.S.C. App. § 740, which extends admiralty jurisdiction to "all cases of damage or injury, to person or property, caused by a vessel on navigable water." The vessel in question was a crane barge which, when doing its repair work on bridges spanning the Chicago River, was secured by legs or spuds driven into the river bottom. *Grubart, supra* at 530. The Court held that admiralty jurisdiction existed under the AEA because the damage had been "caused by a vessel [*i.e.*, the spudded-down crane barge]." *See* 513 U.S. at 535.

In *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991) (*Gizoni I*), the Court reversed a summary judgment which had declared a shipyard worker who spent most of his time aboard a fleet of "floating barges" not a seaman. The Court held that the barges in question ("several floating barges, including a pontoon barge, two float barges, a rail barge, a diver's barge, and a crane barge," *Gizoni, id.* at 83) could be Jones Act vessels. *See id.* at 92. The summary judgment

was found inappropriate on, among other grounds, the vessel status issue because plaintiff had alleged sufficient facts to support a jury finding that the barges were vessels.

Senko v. La Crosse Dredging Corp., 352 U.S. 370 (1957) upheld the Jones Act verdict in favor of a "handyman" who was injured on land while the dredge to which he was assigned was tied to shore. The worker's duties were principally to maintain the barge. He lived ashore, went home every night and had never been aboard the dredge while it was being moved.

Gianfala v. Texas Co., supra, reversed the Fifth Circuit's denial of seaman status to a crew member of a submersible drilling barge which was, at the time of plaintiff's injury, submerged and secured on the seabed. The drilling barge had ordinarily been moved once a year and the plaintiff had no duties connected to the barge's movement. This Court held that a jury finding in favor of seaman status must be reinstated.

Grimes v. Raymond Concrete Pile Co., 356 U.S. 252 (1948) involved a pile driver employed by a construction company hired to build a permanent offshore radar tower to be fixed to the sea floor. Plaintiff lived and worked on the tower as it was towed some 110 miles out to sea and then assisted in the operations necessary to secure it. During this work, he regularly worked on a nearby construction barge. Plaintiff was injured while being transferred from a tug to the tower. The Court reversed a lower court ruling denying seaman status to the plaintiff and remanded for a jury trial.

Norton v. Warner Co., 321 U.S. 565 (1944) held that a general handyman who worked and lived aboard a barge was excluded from coverage under the LHWCA as a member of the barge's crew. The Court emphasized that plaintiff "...had that permanent attachment to the vessel which commonly characterizes a crew." (Emphasis added.)

Ellis v. United States, 206 U.S. 246 (1907) involved the criminal prosecution of dredge operators for the violation of a statute which prohibited contractors engaged in federally funded public works projects from permitting their "laborers and mechanics" to work more than eight hours per day. Seamen were excluded from the reach of the statute. The Court reversed the convictions and relied upon 1 U.S.C. § 3 to find that the dredges were vessels and thus those employed aboard the vessel were seamen. *See id.* at 259-260.

IV. THE PROPOSED TEST IS CLEAR AND SIMPLE AND ALLOWS FOR PREDICTABILITY

A driving force in this Court's creation of the substantial employment connection prong of its seaman status test was to allow employers, workers and insurers "to predict who will be covered by the Jones Act and ... who will be covered by the LHWCA ... before a particular workday begins." *Chandris, supra* at 363. *See also*, *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548, 558 (1997). This goal is no less important in the test for vessel status.

The test used by the First Circuit in this case provides no predictability: vessel status hinges on whether, at the moment of the accident, the craft is under way. *Stewart v. Dutra Construction Company Inc., supra* (*Stewart I*). This is the very kind of "snapshot test" forbidden by the *Chandris* Court; if allowed, it would inevitably result in the "oscillation" between coverage under the Jones Act and LHWCA that this Court was attempting to avoid. *Chandris*, 515 U.S. at 347. By contrast, the standard set by 1 USC § 3 is clear, straightforward and easy to apply. It provides the predictability required by *Chandris* and *Papai, supra*.

The definition of "vessel" in 1 U.S.C. § 3 avoids the confusion and contradiction inherent

in other tests. An excellent example of this confusion is found in the unfortunate degeneration of the *Robison* test in the Fifth Circuit. Since *Robison*, the test for Jones Act vessel status has evolved into an elaborate and complex multi-layered test which includes a host of considerations including the purpose for which the device was constructed and being used (*e.g.*, whether its "transportation function" was "primary" or "merely incidental"); whether it was moored at the time of the accident and, if so, for how long; and finally, no less than nine additional factors including whether the vessel (1) had navigational aids, (2) had a raked bow, (3) had lifeboats and other life-saving equipment, (4) had bilge pumps, (5) had crew quarters, (6) had Coast Guard registration, (7) moved on a regular basis, (8) had the ability to be refloated, and finally (9) the length of time the structure had been in place. *See, e.g.*, *Bernard v. Binnings Const. Co., Inc.*, 741 F.2d 824 (CA5 1984).

The main difficulty with this "test" is that it is so "prolix and flabby" it really is not a test at all.[8] This conclusion is driven home by cases purporting to apply this test to essentially identical facts but reach opposite results. Compare, for instance, *Sharp v. Johnson Bros. Co.*, 917 F.2d 886 (CA5 1990) and *Ellender v. Kiva Const. and Engineering*, 909 F.2d 803 (CA5 1990). Another irreconcilable pair of decisions applying the current Fifth Circuit test are *Manual v. P.A.W. Drilling & Well Service, Inc.*, 135 F.3d 344 (CA5 1998) and *Hurst v. Pilings and Structures, Inc.*, 896 F.2d 504 (CA11 1990).[9]

Manual, supra, represents the Fifth Circuit's most recent attempt to bring order to the Fifth Circuit chaos. And it does indeed restore some order. But the *Manual* panel could not effect

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[8] David W. Robertson, *The Law of Seaman Status Clarified*, 23 J. MAR. L. & C. 1 (January 1992), at pp. 14-15.

[9] *See supra* n. 8 for discussion of cases.

full repairs, and the difficulties in the Fifth Circuit's body of vessel-status doctrine run deep. This is demonstrated by comparing the reasoning of the Fifth Circuit panel in *Manual* with that of the district judge in the same case at 1996 WL 736993 (E.D.La. 1996). In the district court, Judge Porteous reviewed the facts and, applying the Fifth Circuit's complex vessel status doctrine, concluded that, as a matter of law, the drilling rig in question was not a vessel. In the Fifth Circuit, the Court performed the same analysis and concluded, as a matter of law, the drilling rig was a vessel. These exactly opposite results reached by two conscientious judges based on identical facts are a testament to the unworkability of the test they were attempting to apply. The proposed test presents no such difficulties.

V. THE PROPOSED TEST TAKES INTO ACCOUNT THE GREAT VARIETY OF WATERCRAFT ENGAGED IN MARITIME COMMERCE

The Court in *Wilander* recognized that maritime commerce has been served, from its earliest days, by a limitless variety of craft serving "the myriad purposes for which ships set to sea." *Wilander, supra* at 344.

> "In the early periods of maritime commerce, when the oar was the great agent of propulsion, vessels were entirely unlike those of modern times – and each nation and period has had its peculiar agents of commerce and navigation adapted to its own wants and its own waters, and the names and the descriptions of ships and vessels are without number."

Wilander, supra at 344-345, quoting Benedict, AMERICAN ADMIRALTY, § 241, pp.133-134 (1850).

As technology has expanded, so have the kinds of vessels and the purposes to which they are put.[10] Hon. W. Eugene Davis, *The Role of Federal Courts in Admiralty: The Challenge Facing the Admiralty*

[10] Judge Eugene Davis of the Fifth Circuit described the efforts of maritime courts to classify the ever-changing kinds of craft utilized in the offshore and inland exploration for oil and gas.

Judges of the Lower Federal Courts, 75 TUL. L. REV. 1355, 1375 (2001) (citations omitted).

New types of vessels continue, and will continue, to be developed and used in maritime work.[11] As the Court in *Robison* sagely noted, it has been the absence of any narrow or restricted rule of law governing seaman status which has "enabled the law to develop naturally along with the development of unconventional vessels...." *Robison*, 266 F.2d at 780. The proposed test is broad and inclusive enough to capture this wide variety of vessels, now and in the future.

VI. THE PROPOSED TEST FURTHERS THE UNDERLYING POLICY OF THE JONES ACT

The "congressional purpose of the [Jones Act] is 'the benefit and protection of seamen who are peculiarly the wards of admiralty.'" *Cox v. Roth*, 348 U.S. 207, 209 (1955), quoting *The Arizona v. Anelich*, 298 U.S. 110 (1936). The Jones Act is thus "entitled to a liberal construction

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> "Admiralty judges face no greater challenge than that of adapting principles of general maritime law to the changing technology in structures claiming to be vessels in navigation, particularly in the context of determining whether a worker is a seaman. Early decisions struggled with maritime issues arising with dry docks, canal boats, wharf boats, and retired liberty ships. In addition, the search for oil and gas under inland and offshore waters has changed the face of admiralty law. Admiralty judges have considered the status of jack-up drilling rigs, submersible drilling rigs, semisubmersible drilling rigs, drill ships, pipelaying barges, derrick barges, compressor stations, fixed platforms, tenders with widowmakers, spud barges, a quarterboat barge serving as a floating hotel, a submarine pipe alignment rig, and a spar, or 'a nautical structure designed to float with the bulk of the hull below the waves–something akin to a giant buoy.' In other contexts, admiralty judges have considered structures such as museum ships, caissons, floating construction platforms, a tractor trailer transporting a house across a frozen lake, floating casinos, crane barges, a submerged cleaning and maintenance platform used to clean the hulls of vessels, and a vessel mock-up that was used to film the movie TORA, TORA, TORA. Claims have even been made that helicopters should be considered vessels."

[11] *See e.g.*, *Fields v. Pool Offshore, Inc.*, 182 F.3d 353, 353 (CA5 1999), describing the "Neptune Spar"; *Estate of Wenzel v. Seaward Marine Services, Inc.*, 709 F.2d 1326, 1327 n.1 (CA9 1983) ("submerged cleaning and maintenance platform"); *Fox v. Taylor Diving and Salvage Co.*, 694 F.2d 1349, 1351 (CA5 1983) ("submarine pipe alignment rig"); *McKay v. Offshore Speciality Fabricators, Inc.*, 1997 WL 289365 (E.D. La. 1997) ("tension leg wellhead platform"); *Gumpert v. Pittman Const., Inc.*, 736 So.2d 1026, 1030 (La.App. 1999) ("self-propelled transportation platform").

to accomplish its beneficent purposes." *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, 790 (1949).

The proposed test is consistent with this policy underlying the Jones Act because it provides the protections of that law to those sea-based workers who, as a regular part of their employment, are exposed to marine perils, regardless of whether the vessels they serve are traditional or special-purpose vessels.

CONCLUSION

For the foregoing reasons, Amicus urges this Court to reverse the judgment of the Court of Appeals, First Circuit, and to establish a vessel status test as proposed hereinabove.

Respectfully submitted,

John W. deGravelles, Esq.*

618 Main Street
Baton Rouge, LA 70801
(225) 344-3735
Attorney for Amicus Curiae
**Counsel of Record*

David S. Casey, Esq.
1051 31st Street, N.W.
Washington, DC 20007
(202) 965-3500
President, The Association of Trial Lawyers of America

Attorneys for the Amicus Curiae

III. Causation Standard

Norfolk Southern R. Co. v. Sorrell, 549 U.S. ___ 05746 (2007)

SUPREME COURT OF THE UNITED STATES

NORFOLK SOUTHERN RAILWAY CO.
v.
SORRELL

CERTIORARI TO THE COURT OF APPEALS OF MISSOURI

No. 05-746.

Argued: October 10, 2006
Decided: January 10, 2007

[Slip Op. I] Respondent Sorrell was injured while working for the petitioner railroad (Norfolk), and sought damages for his injuries in Missouri state court under the Federal Employers' Liability Act (FELA), which makes a railroad liable for an employee's injuries "resulting in whole or in part from [the railroad's] negligence," Section 1. FELA reduces any damages awarded to an employee "in proportion to the amount [of negligence] attributable to" the employee, Section 3. Missouri's jury instructions apply different causation standards to railroad negligence and employee contributory negligence in FELA actions. An employee will be found contributorily negligent if his negligence "directly contributed to cause" the injury, while railroad negligence is measured by whether the railroad's negligence "contributed in whole or in part" to the injury. After the trial court overruled Norfolk's objection that the instruction on contributory negligence contained a different standard than the railroad negligence instruction, the jury awarded Sorrell $1.5 million. The Missouri Court of Appeals affirmed, rejecting Norfolk's contention that the same causation standard should apply to both parties' negligence.

Held:

1. Norfolk's attempt to expand the question presented to encompass *what* the FELA causation standard should be, not simply whether the standard should be the same for railroad negligence and employee contributory negligence, is rejected. This Court is typically reluctant to permit parties to smuggle additional questions into a case after the grant of certiorari. Although the Court could consider the question of what standard applies as anterior to the question whether the standards may differ, the substantive content of the causation standard is a significant enough issue that the Court prefers not to address it when it has not been fully presented. Pp. 4-6. **[Slip Op. II]**

2. The same causation standard applies to railroad negligence under FELA Section 1 as to employee contributory negligence under Section 3. Absent express language to the contrary, the elements of a FELA claim are determined by reference to the common law, *Urie v. Thompson*, 337 U.S. 163, 182, and unless common-law principles are expressly rejected in FELA's text, they are entitled to great weight, *Consolidated Rail Corporation v. Gottshall*, 512 U.S. 532, 544. The prevailing common-law view at the

time FELA was enacted was that the causation standards for negligence and contributory negligence were the same, and FELA did not expressly depart from this approach. This is strong evidence against Missouri's practice of applying different standards, which is apparently unique among the States. Departing from the common-law practice would in any event have been a peculiar approach for Congress to take in FELA: As a practical matter, it is difficult to reduce damages "in proportion" to the employee's negligence if the relevance of each party's negligence is measured by a different causation standard. The Court thinks it far simpler for a jury to conduct the apportionment FELA mandates if the jury compares like with like. Contrary to Sorrell's argument, the use of the language "in whole or in part" with respect to railroad negligence in FELA Section 1, but not with respect to employee contributory negligence in Section 3, does not justify a departure from the common-law practice of applying a single causation standard. It would have made little sense to include the "in whole or in part" language in Section 3; if the employee's contributory negligence contributed "in whole" to his injury, there would be no recovery against the railroad in the first place. The language made sense in Section 1, however, to clarify that there could be recovery against the railroad even if it were only partially responsible for the injury. In any event, there is no reason to read the statute as a whole to encompass different causation standards, since Section 3 simply does not address causation. Finally, FELA's remedial purpose cannot compensate for the lack of statutory text: FELA does not abrogate the common-law approach. A review of FELA model instructions indicates that there are a variety of ways to instruct a jury to apply the same causation standard to railroad negligence and employee contributory negligence. Missouri has the same flexibility as other jurisdictions in deciding how to do so, so long as it now joins them in applying a single standard. On remand, the Missouri Court of Appeals should address Sorrell's argument that any error in the jury instructions was harmless, and should determine whether a new trial is required. Pp. 6-14.

170 S. W. 3d 35, vacated and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which STEVENS, **[Slip Op. III]** SCALIA, KENNEDY, SOUTER, THOMAS, BREYER, and ALITO, JJ., joined. SOUTER, J., filed a concurring opinion, in which SCALIA and ALITO, JJ., joined. GINSBURG, J., filed an opinion concurring in the judgment.

[Slip Op. 1] CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Timothy Sorrell, respondent in this Court, sustained neck and back injuries while working as a trackman for petitioner Norfolk Southern Railway Company. He filed suit in Missouri state court under the Federal Employers' Liability Act (FELA), 35 Stat. 65, as amended, 45 U.S.C. §§ 51-60, which makes railroads liable to their employees for injuries "resulting in whole or in part from the negligence" of the railroad, § 51. Contributory negligence is not a bar to recovery under FELA, but damages are reduced "in proportion to the amount of negligence attributable to" the employee, § 53. Sorrell was awarded $1.5 million in damages by a jury; Norfolk objects that the jury instructions reflected a more lenient causation standard for railroad negligence than for employee contributory negligence. We conclude that the causation standard under FELA should be the same for both categories of negligence, and accordingly vacate the decision below and remand for further proceedings. **[Slip Op. 2]**

I

On November 1, 1999, while working for Norfolk in Indiana, Sorrell was driving a dump truck loaded with asphalt to be used to repair railroad crossings. While he was driving between crossings on a gravel road alongside the tracks, another Norfolk truck approached, driven by fellow employee Keith Woodin. The two men provided very different accounts of what happened next, but somehow Sorrell's truck veered off the road and tipped on its side, injuring him. According to Sorrell's testimony, Woodin forced Sorrell's truck off the road; according to Woodin, Sorrell drove his truck into a ditch.

On June 18, 2002, Sorrell filed suit against Norfolk in Missouri state court under FELA, alleging that Norfolk failed to provide him with a reasonably safe place to work and that its negligence caused his injuries. Norfolk responded that Sorrell's own negligence caused the accident.

Missouri purports to apply different standards of causation to railroad and employee contributory negligence in its approved jury instructions for FELA liability. The instructions direct a jury to find an employee contributorily negligent if the employee was negligent and his negligence "directly contributed to cause" the injury, Mo. Approved Jury Instr., Civ., No. 32.07 (6th ed. 2002), while allowing a finding of railroad negligence if the railroad was negligent and its negligence contributed "in whole or in part" to the injury, *id.*, No. 24.01.[1] **[Slip Op. 3]**

When Sorrell proposed the Missouri approved instruction for employee contributory negligence, Norfolk objected on the ground that it provided a "different" and "much more exacting" standard for causation than that applicable with respect to the railroad's negligence under the Missouri instructions. App. to Pet. for Cert. 28a-29a. The trial court overruled the objection. App. 9-10. After the jury returned a verdict in favor of Sorrell, Norfolk moved for a new trial, repeating its contention that the different standards were improper because FELA's comparative fault system requires that the same causation standard apply to both categories of negligence. *Id.*, at 20. The trial court denied the motion. The Missouri Court of Appeals affirmed, rejecting Norfolk's contention that "the causation standard should be the same as to the plaintiff and the defendant." App. to Pet. for Cert. 7a, judgt. order reported at 170 S. W. 3d 35 (2005) *(per curiam).* The court explained that Missouri procedural rules require that where an approved instruction exists, it must be given to the exclusion of other instructions. *Ibid.;* see Mo. Rule Civ. Proc. 70.02(b) (2006).

After the Missouri Supreme Court denied discretionary review, App. to Pet. for Cert. 31a, Norfolk sought certiorari in this Court, asking whether the Missouri courts erred in determining that "the causation standard for employee *contributory negligence* under [FELA] differs from the causation standard for railroad *negligence.*" Pet. for Cert. i. Norfolk stated that Missouri was the only jurisdiction to apply different standards, and that this conflicted with several federal court of appeals decisions insisting on a single standard of causation for both railroad and employee negligence. See, *e.g., Page v. St. Louis* **[Slip Op. 4]** *Southwestern R. Co.*, 349 F.2d 820, 823 (CA5 1965) ("[T]he better rule is one of a single standard"); *Ganotis v. New York Central R. Co.*, 342 F.2d 767, 768-769 (CA6 1965) *(per curiam)* ("We do not believe that [FELA] intended to make a distinction between proximate cause when considered in connection with the carrier's negligence and proximate cause when considered in

connection with the employee's contributory negligence"). In response, Sorrell did not dispute that Missouri courts apply "different causation standards . . . to plaintiff's and defendant's negligence in FELA actions: The defendant is subject to a more relaxed causation standard, but the plaintiff is subject only to the traditional common-law standard." Brief in Opposition 2. We granted certiorari. 547 U.S. ___ (2006).

In briefing and argument before this Court, Norfolk has attempted to expand the question presented to encompass *what* the standard of causation under FELA should be, not simply whether the standard should be the same for railroad negligence and employee contributory negligence. In particular, Norfolk contends that the proximate cause standard reflected in the Missouri instruction for employee contributory negligence should apply to the railroad's negligence as well.

Sorrell raises both a substantive and procedural objection in response. Substantively, he argues that this Court departed from a proximate cause standard for railroad negligence under FELA in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957). There we stated:

> "Under [FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.
>
> . . . . . **[Slip Op. 5]**
>
> "[F]or practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit." *Id.*, at 506, 508.

Sorrell argues that these passages from *Rogers* have been interpreted to mean that a plaintiff's burden of proof on the question whether the railroad's negligence caused his injury is less onerous than the proximate cause standard prevailing at common law, citing cases such as *Consolidated Rail Corporation v. Gottshall*, 512 U.S. 532, 542-543 (1994); *Holbrook v. Norfolk Southern R. Co.*, 414 F.3d 739, 741-742 (CA7 2005); *Hernandez v. Trawler Miss Vertie Mae, Inc.*, 187 F.3d 432, 436 (CA4 1999); and *Summers v. Missouri Pacific R. Co.*, 132 F.3d 599, 606-607 (CA10 1997).

Norfolk counters that *Rogers* did not alter the established common-law rule of proximate cause, but rather simply rejected a flawed and unduly stringent version of the rule, the so-called "sole proximate cause" test. According to Norfolk, while most courts of appeals may have read *Rogers* as Sorrell does, several state supreme courts disagree, see, *e.g., Chapman v. Union Pacific R. Co.*, 237 Neb. 617, 626-629, 467 N.W.2d 388, 395-396 (1991); *Marazzato v. Burlington Northern R. Co.*, 249 Mont. 487, 490-491, 817 P.2d 672, 674 (1991), and "there is a deep conflict of authority on precisely that issue." Reply Brief for Petitioner 20, n. 10.

Sorrell's procedural objection is that we did not grant certiorari to determine the proper standard of causation for railroad negligence under FELA, but rather to decide whether different standards for

railroad and employee negligence were permissible under the Act. What is more, Norfolk is not only enlarging the question presented, but taking a position on that enlarged question that is contrary **[Slip Op. 6]** to the position it litigated below. In the Missouri courts, Norfolk argued that Missouri applies different standards, and that the less rigorous standard applied to railroad negligence should also apply to employee contributory negligence. Thus, Norfolk did not object below on causation grounds to the railroad liability instruction, but only to the employee contributory negligence instruction. App. 9-10. Now Norfolk wants to argue the opposite — that the disparity in the standards should be resolved by applying the more rigorous contributory negligence standard to the railroad's negligence as well.

We agree with Sorrell that we should stick to the question on which certiorari was sought and granted. We are typically reluctant to permit parties to smuggle additional questions into a case before us after the grant of certiorari. See *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31-34 (1993) *(per curiam)*. Although Norfolk is doubtless correct that we could consider the question of what standard applies as anterior to the question whether the standards may differ, the issue of the substantive content of the causation standard is significant enough that we prefer not to address it when it has not been fully presented. We also agree with Sorrell that it would be unfair at this point to allow Norfolk to switch gears and seek a ruling from us that the standard should be proximate cause across the board.

What Norfolk *did* argue throughout is that the instructions, when given together, impermissibly created different standards of causation. It chose to present in its petition for certiorari the more limited question whether the courts below erred in applying standards that differ. That is the question on which we granted certiorari and the one we decide today.

II

In response to mounting concern about the number and **[Slip Op. 7]** severity of railroad employees' injuries, Congress in 1908 enacted FELA to provide a compensation scheme for railroad workplace injuries, pre-empting state tort remedies. *Second Employers' Liability Cases*, 223 U.S. 1, 53-55 (1912). Unlike a typical workers' compensation scheme, which provides relief without regard to fault, Section 1 of FELA provides a statutory cause of action sounding in negligence:

> "[E]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . . ." 45 U.S.C. § 51.

FELA provides for concurrent jurisdiction of the state and federal courts, § 56, although substantively FELA actions are governed by federal law. *Chesapeake & Ohio R. Co. v. Stapleton*, 279 U.S. 587, 590 (1929). Absent express language to the contrary, the elements of a FELA claim are determined by reference to the common law. *Urie v. Thompson*, 337 U.S. 163, 182 (1949). One notable deviation from the common law is the abolition of the railroad's common-law defenses of assumption of the risk, § 54; *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 58 (1943), and, at issue in this case, contributory negligence, § 53.

At common law, of course, a plaintiff's contributory negligence operated as an absolute bar to relief. W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 65, pp. 461-462 (5th ed. 1984) (hereinafter Prosser & Keeton); 1 D. Dobbs, Law of Torts § 199, p. 494 (2001) (hereinafter Dobbs). Under Section 3 of FELA, however, an employee's negligence does not bar relief but instead diminishes recovery in proportion to his fault: **[Slip Op. 8]**

> "[In all actions under FELA], the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. . . ." 45 U.S.C. § 53.

Both parties agree that at common law the causation standards for negligence and contributory negligence were the same. Brief for Respondent 40-41; Tr. of Oral Arg. 46-48. As explained in the Second Restatement of Torts:

> "The rules which determine the causal relation between the plaintiff's negligent conduct and the harm resulting to him are the same as those determining the causal relation between the defendant's negligent conduct and resulting harm to others." § 465(2), p. 510 (1964).

See also Prosser & Keeton § 65, at 456; Dobbs§ 199, at 497 ("The same rules of proximate cause that apply on the issue of negligence also apply on the issue of contributory negligence" (footnote omitted)). This was the prevailing view when FELA was enacted in 1908. See 1 T. Shearman & A. Redfield, A Treatise on the Law of Negligence § 94, pp. 143-144 (5th ed. 1898) ("The plaintiff's fault . . . must be a proximate cause, in the same sense in which the defendant's negligence must have been a proximate cause in order to give any right of action").

Missouri's practice of applying different causation standards in FELA actions is apparently unique. Norfolk claims that Missouri is the only jurisdiction to allow such a disparity, and Sorrell has not identified another.[2] It is of **[Slip Op. 9]** course possible that everyone is out of step except Missouri, **[Slip Op. 10]** but we find no basis for concluding that Congress in FELA meant to allow disparate causation standards.

We have explained that "although common-law principles are not necessarily dispositive of questions arising under FELA, unless they are expressly rejected in the text of the statute, they are entitled to great weight in our analysis." *Gottshall*, 512 U.S., at 544. In *Gottshall* we "cataloged" the ways in which FELA expressly departed from the common law: it abolished the fellow servant rule, rejected contributory negligence in favor of comparative negligence, prohibited employers from contracting around the Act, and abolished the assumption of risk defense. *Norfolk & Western R. Co. v. Ayers*, 538 U.S. 135, 145 (2003); *Gottshall, supra*, at 542-543. The fact that the common law applied the same causation standard to defendant and plaintiff negligence, and FELA did not expressly depart from that approach, is strong evidence against Missouri's disparate standards. See also *Monessen Southwestern R. Co. v. Morgan*, 486 U.S. 330, 337-338 (1988) (holding that, because FELA abrogated some common-law rules explicitly but did not address "the equally well-established doctrine barring the recovery of

prejudgment interest, . . . we are unpersuaded that Congress intended to abrogate that doctrine *sub silentio*").

Departing from the common-law practice of applying a single standard of causation for negligence and contributory negligence would have been a peculiar approach for Congress to take in FELA. As one court explained, under FELA,

> "[a]s to both attack or defense, there are two common elements, (1) negligence, i.e., the standard of care, and (2) causation, i.e., the relation of the negligence to the injury. So far as negligence is concerned, that standard is the same — ordinary prudence — for both Employee and Railroad alike. Unless a contrary result is **[Slip Op. 11]** imperative, it is, at best, unfortunate if two standards of causation are used." *Page*, 349 F.2d, at 823.

As a practical matter, it is difficult to reduce damages "in proportion" to the employee's negligence if the relevance of each party's negligence to the injury is measured by a different standard of causation. Norfolk argues, persuasively we think, that it is far simpler for a jury to conduct the apportionment FELA mandates if the jury compares like with like — apples to apples.

Other courts to address this question concur. See *Fashauer v. New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1282-1283 (CA3 1995); *Caplinger v. Northern Pacific Terminal*, 244 Ore. 289, 290-292, 418 P.2d 34, 35-36 (1966) (in banc); *Page, supra*, at 822-823; *Ganotis*, 342 F.2d, at 768-769.[3] The most thoughtful treatment comes in *Page*, in which the Fifth Circuit stated: "[W]e think that from the very nature of comparative negligence, the standard of causation should be single. . . . Use of the terms 'in proportion to' and 'negligence attributable to' the injured worker inescapably calls for a comparison. . . . [I]t is obvious that for a system of comparative fault to work, the basis of comparison has to be the same." 349 F.2d, at 824. See also Restatement (Third) of Torts: Apportionment of Liability § 3, Reporters' Note, p. 37, Comment *a* (1999) ("[C]omparative responsibility is difficult to administer **[Slip Op. 12]** when different rules govern different parts of the same lawsuit"). We appreciate that there may well be reason to "doubt that such casuistries have any practical significance [for] the jury," *Page, supra*, at 823, but it seems to us that Missouri's idiosyncratic approach of applying different standards of causation unduly muddies what may, to a jury, be already murky waters.

Sorrell argues that FELA does contain an explicit statutory alteration from the common-law rule: Section 1 of FELA — addressing railroad negligence — uses the language "in whole or in part," 45 U.S.C. § 51, while Section 3 — covering employee contributory negligence — does not, § 53. This, Sorrell contends, evinces an intent to depart from the common-law causation standard with respect to railroad negligence under Section 1, but not with respect to any employee contributory negligence under Section 3.

The inclusion of this language in one section and not the other does not alone justify a departure from the common-law practice of applying a single standard of causation. It would have made little sense to include the "in whole or in part" language in Section 3, because if the employee's contributory negligence contributed "in whole" to his injury, there would be no recovery against the railroad in the

first place. The language made sense in Section 1, however, to make clear that there could be recovery against the railroad even if it were only partially negligent.

Even if the language in Section 1 is understood to address the standard of causation, and not simply to reflect the fact that contributory negligence is no longer a complete bar to recovery, there is no reason to read the statute as a whole to encompass different causation standards. Section 3 simply does not address causation. On the question whether a different standard of causation applies as between the two parties, the statutory text is silent.

Finally, in urging that a higher standard of causation for plaintiff contributory negligence is acceptable, Sorrell **[Slip Op. 13]** invokes FELA's remedial purpose and our history of liberal construction. We are not persuaded. FELA was indeed enacted to benefit railroad employees, as the express abrogation of such common-law defenses as assumption of risk, the contributory negligence bar, and the fellow servant rule make clear. See *Ayers*, 538 U.S., at 145. It does not follow, however, that this remedial purpose requires us to interpret every uncertainty in the Act in favor of employees. See *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) *(per curiam)* ("[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primarily objective must be the law"). FELA's text does not support the proposition that Congress meant to take the unusual step of applying different causation standards in a comparative negligence regime, and the statute's remedial purpose cannot compensate for the lack of a statutory basis.

We conclude that FELA does not abrogate the common-law approach, and that the same standard of causation applies to railroad negligence under Section 1 as to plaintiff contributory negligence under Section 3. Sorrell does not dispute that Missouri applies different standards, see Brief for Respondent 40-41; see also Mo. Approved Jury Instr., Civ., No. 24.01, Committee's Comment (1978 New), and accordingly we vacate the judgment below and remand the case for further proceedings.

The question presented in this case is a narrow one, and we see no need to do more than answer that question in today's decision. As a review of FELA model instructions indicates, n. 2, *supra*, there are a variety of ways to instruct a jury to apply the same causation standard to railroad negligence and employee contributory negligence. Missouri has the same flexibility as the other States in deciding how to do so, so long as it now joins them in applying a single standard.

Sorrell maintains that even if the instructions improperly **[Slip Op. 14]** contained different causation standards we should nonetheless affirm because any error was harmless. He argues that the evidence of his negligence presented at trial, if credited by the jury, could only have been a "direct" cause, so that even with revised instructions the result would not change. This argument is better addressed by the Missouri Court of Appeals, and we leave it to that court on remand to determine whether a new trial is required in this case.

The judgment of the Missouri Court of Appeals is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

FOOTNOTES

[1] Missouri in the past directed a jury to find a railroad liable if the railroad's negligence "directly resulted in whole or in part in injury to plaintiff." Mo. Approved Jury Instr., Civ., No. 24.01 (1964). This language persisted until 1978, when the instruction was modified to its present version. *Ibid.* (2d ed. 1969, Supp. 1980). The commentary explains that the word "direct" was excised because, under FELA, "the traditional doctrine of proximate (direct) cause is not applicable." *Id.*, No. 24.01, p. 187 (Committee's Comment (1978 new)). Cf. *Leake v. Burlington Northern R. Co.*, 892 S.W.2d 359, 364-365 (Mo. App. 1995). The contributory negligence instruction, on the other hand, has remained unchanged. Mo. Approved Jury Instr., Civ., No. 32.07(B) (6th ed. 2002).

[2] A review of model and pattern jury instructions in FELA actions reveals a variety of approaches. Some jurisdictions recommend using the "in whole or in part" or "in any part" formulation for both railroad negligence and plaintiff contributory negligence, by using the same language in the respective pattern instructions, including a third instruction that the same causation standard is applied to both parties, or including in commentary an admonition to that effect. See, *e.g.*, 5 L. Sand, J. Siffert, W. Loughlin, S. Reiss, & N. Batterman, Modern Federal Jury Instructions — Civil ¶¶ 89.02-89.03, pp. 89-7, 89-44, 89-53 (3d ed. 2006); 4 Fla. Forms of Jury Instruction §§ 161.02, 161.47, 161.60 (2006); Cal. Jury Instr., Civ., Nos. 11.07, 11.14, and Comment (2005); 3 Ill. Forms of Jury Instruction §§ 91.02[1], 91.50[1] (2005); 3 N. M. Rules Ann., Uniform Jury Instr., Civ., Nos. 13-905, 13-909, 13-915 (2004); Model Utah Jury Instr., Civ., Nos. 14.4, 14.7, 14.8 (1993 ed.); Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit § 7.03, and n. 7 (2005); Eleventh Circuit Pattern Jury Instructions (Civil Cases) § 7.1 (2005). Other jurisdictions use the statutory formulation ("in whole or in part") for railroad negligence, and do not contain a pattern instruction for contributory negligence. See, *e.g.*, Mich. Non-Standard Jury Instr., Civ., § 12:53 (Supp. 2006). Both Alabama and Virginia use formulations containing language of both proximate cause and in whole or in part. 1 Ala. Pattern Jury Instr., Civ., Nos. 17.01, 17.05 (2d ed. 1993) (railroad negligence "proximately caused, in whole or in part"; plaintiff contributory negligence "proximately contributed to cause"); 1 Va. Jury Instructions §§ 40.01, 40.02 (3d ed. 1998) (railroad negligence "in whole or in part was the proximate cause of or proximately contributed to cause," plaintiff negligence "contributed to cause"). In New York, the pattern instructions provide that railroad causation is measured by whether the injury results "in whole or in part" from the railroad's negligence, and a plaintiff's contributory negligence diminishes recovery if it "contributed to caus[e]" the injury. 1B N. Y. Pattern Jury Instr., Civ., No. 2:180 (3d ed. 2006). Montana provides only a general FELA causation instruction. Mont. Pattern Instr., Civ., No. 6.05 (1997) ("[A]n act or a failure to act is the cause of an injury if it plays a part, no matter how small, in bringing about the injury"). Kansas has codified instructions similar to Missouri's, Kan. Pattern Instr. 3d, Civ., No. 132.01 (2005) (railroad liable when injury "results in whole or in part" from railroad's negligence); id., No. 132.20 (contributory negligence is negligence on the part of the plaintiff that "contributes as a direct cause" of the injury), but the commentary to these instructions cites cases and instructions applying a single standard, id., No. 132.01, and Comment, and in practice the Kansas courts have used the language of in whole or in part for both parties' negligence. See *Merando v. Atchison, T. & S. F. R. Co.*, 232 Kan. 404, 406-409, 656 P.2d 154, 157-158 (1982).

[3] See also *Bunting v. Sun Co., Inc.*, 434 Pa. Super. 404, 409-411, 643 A. 2d 1085, 1088 (1994); *Hickox v. Seaboard System R. Co.*, 183 Ga. App. 330, 331-332, 358 S.E.2d 889, 891-892 (1987). An exception is a Texas case that no court has since cited for the proposition, *Missouri-Kansas-Texas R. Co. v. H. T. Shelton*, 383 S.W.2d 842, 844-846 (Civ. App. 1964), and that the Texas model jury instructions, which instruct the jury to determine plaintiff or railroad negligence using a single "in whole or in part" causation standard, at least implicitly disavow. See 10 West's Texas Forms: Civil Trial and Appellate Practice § 23.34, p. 27 (3d ed. 2000) ("Did the negligence, if any, of the [plaintiff or railroad] cause, in whole or in part, the occurrence in question?").

[Slip Op. 1] JUSTICE SOUTER, with whom JUSTICE SCALIA and JUSTICE ALITO join, concurring.

I agree that the same standard of causal connection controls the recognition of both a defendant-employer's negligence and a plaintiff-employee's contributory negligence in Federal Employers' Liability Act (FELA) suits, and I share the Court's caution in remanding for the Missouri Court of Appeals to determine in the first instance just what that common causal relationship must be, if it should turn out that the difference in possible standards would affect judgment on the verdict in this case.The litigation in the Missouri courts did not focus on the issue of what the shared standard should be, and the submissions in this Court did not explore the matter comprehensively.

The briefs and arguments here did, however, adequately address the case of ours with which exploration will begin, and I think it is fair to say a word about the holding in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957). Despite some courts' views to the contrary,* *Rogers* did not **[Slip Op. 2]** address, much less alter, existing law governing the degree of causation necessary for redressing negligence as the cause of negligently inflicted harm; the case merely instructed courts how to proceed when there are multiple cognizable causes of an injury.

Prior to FELA, it was clear common law that a plaintiff had to prove that a defendant's negligence caused his injury proximately, not indirectly or remotely. See, *e.g.*, 3 J. Lawson, Rights, Remedies, and Practice 1740 (1890) ("Natural, proximate, and legal results are all that damages can be recovered for, even under a statute entitling one 'to recover *any* damage'"); T. Cooley, Law of Torts 73 (2d ed. 1888) (same). Defendants were held to the same **[Slip Op. 3]** standard: under the law of that day, a plaintiff's contributory negligence was an absolute bar to his recovery if, but only if, it was a proximate cause of his harm. See *Grand Trunk R. Co. v. Ives*, 144 U.S. 408, 429 (1892).

FELA changed some rules but, as we have said more than once, when Congress abrogated common law rules in FELA, it did so expressly. *Norfolk & Western R. Co. v. Ayers*, 538 U.S. 135, 145 (2003); *Consolidated Rail Corporation v. Gottshall*, 512 U.S. 532, 544 (1994); see also *Second Employers' Liability Cases*, 223 U.S. 1, 49-50 (1912) (cataloguing FELA's departures from the common law). Among FELA's explicit common law targets, the rule of contributory negligence as a categorical bar to a plaintiff's recovery was dropped and replaced with a comparative negligence regime. 45 U.S.C. § 53; see *Grand Trunk Western R. Co. v. Lindsay*, 233 U.S. 42, 49 (1914). FELA said nothing, however, about the familiar proximate cause standard for claims either of a defendant-employer's negligence or a plaintiff-employee's contributory negligence, and throughout the half-century between FELA's enactment and the decision in *Rogers*, we consistently recognized and applied proximate cause as the proper standard in FELA suits. See, *e.g., Tennant v. Peoria & Pekin Union R. Co.*, 321 U.S. 29, 32 (1944) (FELA plaintiff must prove that "negligence was the proximate cause in whole or in part" of his injury); see also *Urie v. Thompson*, 337 U.S. 163, 195 (1949) (recognizing proximate cause as the appropriate standard in FELA suits); *St. Louis-San Francisco R. Co. v. Mills*, 271 U.S. 344 (1926) (judgment as a matter of law owing to FELA plaintiff's failure to prove proximate cause).

Rogers left this law where it was. We granted certiorari in *Rogers* to establish the test for submitting a case to a jury when the evidence would permit a finding that an injury had multiple causes. 352 U.S., at 501, 506. We rejected Missouri's "language of proximate causation **[Slip Op. 4]** which ma[de] a jury question [about a defendant's liability] dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury." *Id.*, at 506. The notion that proximate cause must be exclusive proximate cause undermined Congress's chosen scheme of comparative negligence by effectively reviving the old rule of contributory negligence as barring any relief, and we held that a FELA plaintiff may recover even when the defendant's action was a partial cause of injury but not the sole one. Recovery under the statute is possible, we said, even when an employer's contribution to injury was slight in relation to all other legally cognizable causes.

True, I would have to stipulate that clarity was not well served by the statement in *Rogers* that a case must go to a jury where "the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Ibid.* But that statement did not address and should not be read as affecting the necessary directness of cognizable causation, as distinct from the occasional multiplicity of causations. It spoke to apportioning liability among parties, each of whom was understood to have had some hand in causing damage directly enough to be what the law traditionally called a proximate cause.

The absence of any intent to water down the common law requirement of proximate cause is evident from the prior cases on which *Rogers* relied. To begin with, the "any part, even the slightest" excerpt of the opinion (cited by respondent in arguing that *Rogers* created a more "relaxed" standard of causation than proximate cause) itself cited *Coray v. Southern Pacific Co.*, 335 U.S. 520 (1949). See *Rogers, supra*, at 506, n. 11. There, just eight years before *Rogers*, Justice Black unambiguously recognized proximate cause as the standard applicable in FELA suits. 335 U.S., at 523 ("[P]etitioner was entitled to recover **[Slip Op. 5]** if this defective equipment was the sole or a contributory proximate cause of the decedent employee's death"). Second, the *Rogers* Court's discussion of causation under "safety-appliance statutes" contained a cross-reference to *Coray* and a citation to *Carter v. Atlanta & St. Andrews Bay R. Co.*, 338 U.S. 430 (1949), a case which likewise held there was liability only if "the jury determines that the defendant's breach is a 'contributory proximate cause' of injury," *id.*, at 435. *Rogers, supra*, at 507, n. 13.

If more were needed to confirm the limited scope of what *Rogers* held, the Court's quotation of the Missouri trial court's jury charge in that case would supply it, for the instructions covered the requirement to show proximate cause connecting negligence and harm, a point free of controversy:

> "'[I]f you further find that the plaintiff . . . did not exercise ordinary care for his own safety and was guilty of negligence and that such negligence, if any[,] was the sole proximate cause of his injuries, if any, and that such alleged injuries, if any, were not directly contributed to or caused by any negligence of the defendant . . . then, in that event, the plaintiff is not entitled to recover against the defendant, and you will find your verdict in favor of the defendant.'" 352 U.S., at 505, n. 9.

Thus, the trial judge spoke of "proximate cause" by plaintiff's own negligence, and for defendant's negligence used the familiar term of art for proximate cause, in referring to a showing that the defendant "directly contributed to or caused" the plaintiff's injuries. We took no issue with the trial court's instruction in this respect, but addressed the significance of multiple causations, as explained above.

Whether FELA is properly read today as requiring proof of proximate causation before recognizing negligence is up **[Slip Op. 6]** to the Missouri Court of Appeals to determine in the first instance, if necessary for the resolution of this case on remand. If the state court decides to take on that issue, it will necessarily deal with *Rogers*, which in my judgment is no authority for anything less than proximate causation in an action under FELA. The state court may likewise need to address post-*Rogers* cases (including some of our own); I do not mean to suggest any view of them except for the misreading of *Rogers* expressed here and there.

FOOTNOTES

* Recently, some courts have taken the view that Rogers smuggled proximate cause out of the concept of defendant liability under FELA. See, *e.g., Holbrook v. Norfolk Southern R. Co.*, 414 F.3d 739, 741-742 (CA7 2005) (concluding that "a plaintiff's burden when suing under the FELA is significantly lighter than in an ordinary negligence case" because "a railroad will be held liable where 'employer negligence played any part, even the slightest, in producing the injury'" (quoting *Rogers*, 352 U.S., at 506)); *Summers v. Missouri Pacific R. Co.*, 132 F.3d 599, 606-607 (CA10 1997) (holding that, in Rogers, the Supreme Court "definitively abandoned" the requirement of proximate cause in FELA suits); *Oglesby v. Southern Pacific Transp. Co.*, 6 F.3d 603, 606-609 (CA9 1993) (same). But several State Supreme Courts have explicitly or implicitly espoused the opposite view. See *Marazzato v. Burlington No. R., Co.*, 249 Mont. 487, 490-491, 817 P.2d 672, 674-675 (1991) (*Rogers* addressed multiple causation only, leaving FELA plaintiffs with "the burden of proving that defendant's negligence was the proximate cause in whole or in part of plaintiff's [death]" (alteration in original)); see also *Gardner v. CSX Transp., Inc.*, 201 W. Va. 490, 500, 498 S.E.2d 473, 483 (1997) ("[T]o prevail on a claim under [FELA], a plaintiff employee must establish that the defendant employer acted negligently and that such negligence contributed proximately, in whole or in part, to plaintiff's injury"); *Snipes v. Chicago Central & Pacific R. Co.*, 484 N.W.2d 162, 164 (Iowa 1992) ("Recovery under the FELA requires an injured employee to prove that the defendant employer was negligent and that the negligence proximately caused, in whole or in part, the accident"); *Chapman v. Union Pacific R. Co.*, 237 Neb. 617, 627, 467 N.W.2d 388, 395 (1991) ("To recover under [FELA], an employee must prove the employer's negligence and that the alleged negligence is a proximate cause of the employee's injury.

[Slip Op. 1] JUSTICE GINSBURG, concurring in the judgment.

The Court today holds simply and only that in cases under the Federal Employers' Liability Act (FELA), railroad negligence and employee contributory negligence are governed by the same causation standard. I concur in that judgment. It should be recalled, however, that the Court has several times stated what a plaintiff must prove to warrant submission of a FELA case to a jury. That question is long settled, we have no cause to reexamine it, and I do not read the Court's decision to cast a shadow of doubt on the matter.

In *Consolidated Rail Corporation v. Gottshall*, 512 U.S. 532, 543 (1994), we acknowledged that "a relaxed causation standard applies under FELA." Decades earlier, in *Crane v. Cedar Rapids & Iowa City*

R. Co., 395 U.S. 164 (1969), we said that a FELA plaintiff need prove "only that his injury resulted in whole or in part from the railroad's violation." *Id.*, at 166 (internal quotation marks omitted). Both decisions referred to the Court's oft-cited opinion in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957), which declared: "Under [FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest*, in producing the injury or death for which damages are sought." *Id.*, at 506 (emphasis added). *Rogers*, in **[Slip Op. 2]** turn, drew upon *Coray v. Southern Pacific Co.*, 335 U.S. 520, 524 (1949), in which the Court observed: "Congress . . . imposed extraordinary safety obligations upon railroads and has commanded that if a breach of these obligations contributes in part to an employee's death, the railroad must pay damages."

These decisions answer the question Norfolk sought to "smuggle . . . into" this case, see *ante*, at 5-6, *i.e.*, what is the proper standard of causation for railroad negligence under FELA. Today's opinion leaves in place precedent solidly establishing that the causation standard in FELA actions is more "relaxed" than in tort litigation generally.

A few further points bear emphasis. First, it is sometimes said that *Rogers* eliminated proximate cause in FELA actions. See, *e.g., Crane*, 395 U.S., at 166 (A FELA plaintiff "is not required to prove common-law proximate causation."); *Summers v. Missouri Pacific R. Co.*, 132 F.3d 599, 606 (CA10 1997) ("During the first half of this century, it was customary for courts to analyze liability under . . . FELA in terms of proximate causation. However, the Supreme Court definitively abandoned this approach in *Rogers*." (citation omitted)); *Oglesby v. Southern Pacific Transp. Co.*, 6 F.3d 602, 609 (CA9 1993) ("[Our] holding is consistent with the case law of several other circuits which have found [that] 'proximate cause' is not required to establish causation under the FELA."). It would be more accurate, as I see it, to recognize that *Rogers* describes the test for proximate causation applicable in FELA suits. That test is whether "employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." 352 U.S., at 506.

Whether a defendant's negligence is a proximate cause of the plaintiff's injury entails a judgment, at least in part policy based, as to how far down the chain of consequences a defendant should be held responsible for its wrongdoing. See *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 352, 162 **[Slip Op. 3]** N.E. 99, 103 (1928) (Andrews, J., dissenting) ("What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point."). In FELA cases, strong policy considerations inform the causation calculus.

FELA was prompted by concerns about the welfare of railroad workers. "Cognizant of the physical dangers of railroading that resulted in the death or maiming of thousands of workers every year," and dissatisfied with the tort remedies available under state common law, "Congress crafted a federal remedy that shifted part of the human overhead of doing business from employees to their employers." *Gottshall*, 512 U.S., at 542 (internal quotation marks omitted); see also *Wilkerson v. McCarthy*, 336 U.S. 53, 68 (1949) (Douglas, J., concurring) (FELA "was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations."). "We have liberally construed FELA to further Congress' remedial goal." *Gottshall*, 512 U.S., at 543. With the motivation

for FELA center stage in *Rogers*, we held that a FELA plaintiff can get to a jury if he can show that his employer's negligence was even the slightest cause of his injury.

The "slightest" cause sounds far less exacting than "proximate" cause, which may account for the statements in judicial opinions that *Rogers* dispensed with proximate cause for FELA actions. These statements seem to me reflective of pervasive confusion engendered by the term "proximate cause." As Prosser and Keeton explains:

> "The word 'proximate' is a legacy of Lord Chancellor Bacon, who in his time committed other sins. The word means nothing more than near or immediate; and when it was first taken up by the courts it had connotations of proximity in time and space which **[Slip Op. 4]** have long since disappeared. It is an unfortunate word, which places an entirely wrong emphasis upon the factor of physical or mechanical closeness. For this reason 'legal cause' or perhaps even 'responsible cause' would be a more appropriate term." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 42, p. 273 (5th ed. 1984) (footnotes omitted).

If we take up Prosser and Keeton's suggestion to substitute "legal cause" for "proximate cause," we can statemore clearly what *Rogers* held: Whenever a railroad's negligence is the slightest cause of the plaintiff's injury, it is a legal cause, for which the railroad is properly held responsible. [1]

If the term "proximate cause" is confounding to jurists, it is even more bewildering to jurors. Nothing in today's opinion should encourage courts to use "proximate cause," or any term like it, in jury instructions. "[L]egal concepts such as 'proximate cause' and 'foreseeability' are best left to arguments between attorneys for consideration by judges or justices; they are not terms which are properly submitted to a lay jury, and when submitted can only serve to confuse jurors and distract them from deciding cases based on their merits." *Busta v. Columbus Hospital Corp.*, 276 Mont. 342, 371, 916 P.2d 122, 139 (1996). Accord *Mitchell v. Gonzales*, 54 Cal.3d 1041, 1050, 819 P.2d 872, 877 (1991) ("It is reasonably likely that when jurors hear the term 'proximate cause' they may misunderstand its meaning."). [2] **[Slip Op. 5]**

Sound jury instructions in FELA cases would resemble the model federal charges cited in the Court's opinion. *Ante*, at 8, n. 2. As to railroad negligence, the relevant instruction tells the jury:

> "The fourth element [of a FELA action] is whether an injury to the plaintiff resulted in whole or in part from the negligence of the railroad or its employees or agents. In other words, did such negligence play any part, even the slightest, in bringing about an injury to the plaintiff?" 5 L. Sand, J. Siffert, W. Loughlin, S. Reiss, & N. Batterman, Modern Federal Jury Instructions — Civil ¶ 89.02, p. 89-44 (3d ed. 2006).

Regarding contributory negligence, the relevant instruction reads:

"To determine whether the plaintiff was 'contributorily negligent,' you . . . apply the same rule of causation, that is, did the plaintiff's negligence, if any, play any part in bringing about his injuries." *Id.*, ¶ 89.03, p. 89-53.

Both instructions direct jurors in plain terms that they can be expected to understand.

Finally, as the Court notes, *ante*, at 13-14, on remand, the Missouri Court of Appeals will determine whether a new trial is required in this case, owing to the failure of the trial judge properly to align the charges on negligence and contributory negligence. The trial court instructed the jury to find Norfolk liable if the railroad's negligence "resulted in whole or in part in injury to plaintiff." App. **[Slip Op. 6]** 14. In contrast, the court told the jury to find Sorrell contributorily negligent only if he engaged in negligent conduct that "*directly* contributed to cause his injury." *Id.*, at 15 (emphasis added). At trial, Norfolk sought a different contributory negligence instruction. Its proposed charge would have informed the jury that Sorrell could be held responsible, at least in part, if his own negligence "contributed in whole or in part to cause his injury." *Id.*, at 11.

Norfolk's proposal was superior to the contributory negligence instruction in fact delivered by the trial court, for the railroad's phrasing did not use the word "directly."[3] As Sorrell points out, however, the instructional error was almost certainly harmless. Norfolk alleged that Sorrell drove his truck negligently, causing it to flip on its side. Under the facts of this case, it is difficult to imagine that a jury could find Sorrell negligent in a manner that contributed to his injury, but only indirectly.

Norfolk urged in this Court, belatedly and unsuccessfully, that the charge on negligence was erroneous and should have been revised to conform to the charge in fact delivered on contributory negligence. See *ante*, at 4. That argument cannot be reconciled with our precedent. See *supra*, at 1-2. Even if it could, it would be unavailing in the circumstances here presented. Again, there is little likelihood that a jury could find that Norfolk's negligence contributed to Sorrell's injury, but only indirectly.

* * *

With the above-described qualifications, I concur in the Court's judgment.

FOOTNOTES

[1] I do not read JUSTICE SOUTER'S concurring opinion as taking a position on the appropriate causation standard as expressed in *Consolidated Rail Corporation v. Gottshall*, 512 U.S. 532 (1994), and *Crane v. Cedar Rapids & Iowa City R. Co.*, 395 U.S. 164 (1969). See *supra*, at 1-2.

[2] See also Stapleton, Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences, 54 Vand. L. Rev. 941, 987 (2001) ("[T]he inadequacy and vagueness of jury instructions on 'proximate cause' is notorious."); Cork, A Better Orientation for Jury Instructions, 54 Mercer L. Rev. 1, 53-54 (2002) (criticizing Georgia's jury instruction on proximate cause as incomprehensible);

Steele & Thornburg, Jury Instructions: A Persistent Failure to Communicate, 67 N. C. L. Rev. 77 (1988) (demonstrating juror confusion about proximate causeinstructions).

[3] Norfolk's proposed instruction was, nevertheless, imperfect. As the Court notes, if the employee's negligence "contributed 'in whole' to his injury, there would be no recovery against the railroad in the first placë. *Ante*, at 12.

Court's Instruction No. ___
4.6

4.6 CAUSATION

Not every injury that follows an accident necessarily results from it. The accident must be the cause of the injury.

In determining causation, a different rule applies to the Jones Act claim and to the unseaworthiness claim.

Under the Jones Act, for both the employer's negligence and the plaintiff's contributory negligence an injury or damage is considered caused by an act or failure to act if the act or omission brought about or actually caused the injury or damage, in whole or in part.

In an unseaworthiness claim, the plaintiff must show, not merely that the unseaworthy condition was a cause of the injury, but that such condition was a proximate cause of it. This means that the plaintiff must show that the condition in question played a substantial part [was a substantial factor] in bringing about or actually causing his injury, and that the injury was either a direct result or a reasonably probable consequence of the condition.

Court's Instruction No. ___
5.1

5.1 FEDERAL EMPLOYERS LIABILITY ACT (45 U.S.C. SECTION 51 ET SEQ.)

The plaintiff is making a claim under the Federal Employers Liability Act. To win, the plaintiff must prove each of the following elements by a preponderance of the evidence:

1. That at the time of the plaintiff's injury, he (she) was an employee of the defendant performing duties in the course of his (her) employment;

2. That the defendant was at such time a common carrier by railroad, engaged in interstate commerce;

3. That the defendant was "negligent"; and

4. That defendant's negligence was a "legal cause" of damage sustained by the plaintiff.

The plaintiff claims that the defendant was negligent because [*describe the specific act(s) or omission(s) asserted as negligence on the part of the defendant*].

Negligence is the failure to use reasonable care. Reasonable care is that degree of care that a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances, or in failing to do something that a reasonably careful person would do under like circumstances.

Negligence is a legal cause of damage if it played any part, no matter how small, in bringing about or actually causing the injury or damage. If you find that the defendant was negligent and that the defendant's negligence contributed in any way toward any injury or damage suffered by the plaintiff, you must find that such injury or damage was legally caused by the defendant's act or omission. Negligence may be a legal cause of damage even though it operates in combination with the act of another, or some natural cause, or some other cause, if the negligence played any part, no matter how small, in causing the damage.

If the plaintiff does not establish his claim by a preponderance of the evidence, your verdict must be for the defendant. If, however, plaintiff does establish his claim by a preponderance of the evidence, then you must consider the defense raised by the defendant.

The defendant contends that the plaintiff was negligent and that such negligence was a legal cause of the plaintiff's injury. The defendant bears the burden of proving that the plaintiff was negligent. The defendant must establish:

1. That the plaintiff was also negligent; and

2. That such negligence was a legal cause of the plaintiff's own damage.

If you find that the defendant was negligent and that the plaintiff was negligent, then the plaintiff will not be barred from recovery, but his recovery will be reduced. Let me give you an example: If you find that the accident was due partly to the fault of the plaintiff, that the plaintiff's own negligence was, for example, 10% responsible for the damage, then you must fill in that percentage as your finding on the special verdict form that I will explain to you. Your finding that the plaintiff was negligent does not prevent him from recovering; I will merely reduce the plaintiff's total damages by the percentage that you insert. Of course, by using the number 10% as an example, I do not mean to suggest any specific figure to you. If you find that the plaintiff was negligent, you might find any amount between 1% and 99%.

IV. Update on Death Remedies

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MARITIME DEATH REMEDIES REVISITED

> Today we restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law
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> . . .
>
> Cognizant of the constitutional relationship between the courts and Congress, we today act in accordance with the uniform plan of maritime tort law Congress created in DOHSA and the Jones Act. We hold that there is a general maritime cause of action for the wrongful death of a seaman, but that damages recoverable in such an action do not include loss of society. We also hold that a general maritime survival action cannot include recovery for decedent's lost future earnings."

This language is taken from Miles v. Apex Marine Corp.[1] It reveals the heart of the Court's decision-creation of uniform rules for death damages recoverable under the Jones Act, DOHSA and the general maritime law. Since Miles, seamen's recovery for wrongful death under the general maritime law is limited to actual pecuniary loss. Non-pecuniary damages in the form of loss of consortium and spousal services were eliminated. Presumably, punitive damages are also prohibited, although the Supreme Court did not specifically so hold.

Although the Court may have achieved uniformity in the remedies available to seamen against their employers in wrongful death cases, there are greater inconsistencies today in maritime death remedies under U.S. maritime law than ever before. If admiralty practitioners are not confused, then they should be. While death remedies for seamen against their employers are substantially uniform regardless of the location of the injury (i.e. state or federal waters), the same cannot be said for seamen third party death claims, longshoremen and non-seafarer death

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[1] 498 U.S. 19, 111 S.Ct. 317 (1990).

claims.[2] Further, recent changes to the Death on the High Seas Act[3] have created inconsistent remedies within the statute itself.

Against this background, the following is a review of wrongful death remedies currently available in the maritime setting. The lack of uniformity is self evident.

I JONES ACT SEAMEN

Beneficiaries of Jones Act seamen killed in the service of the vessel are limited to pecuniary losses regardless of the casualty location. Under the Jones Act, beneficiaries include the surviving widow or husband and children of the seaman, and, if none, then the next of kin who are dependant upon the seaman for support.[4] Because DOHSA does not list beneficiaries as does the Jones Act through its reference to FELA, more peripheral relatives who are actually dependent upon the victim may also claim damages.[5] Non-pecuniary damages are unavailable to seamen beneficiaries under the Jones Act and DOHSA because these controlling statutes do not provide for non-pecuniary recovery.[6]

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2 See footnotes 15, 16, 17, 18 and 28 herein.

3 46 U.S.C. §761, et seq., commonly known as DOHSA.

[4]Compare 46 U.S.C. §688 and, By Incorporation, 45 U.S.C. §51 with 46 U.S.C §761.

[5]Id.; Safir v. Compagnie Generale Transatlantique, 241 F. Supp. 501 (S.D.N.Y. 1965).

6 Miles, 111 S.Ct. at 325.

Conscious pain and suffering of the deceased seaman before death is recoverable under the survival provisions of the Jones Act.[7] DOHSA does not have a survival provision like the Jones Act; it precludes the application of any general maritime law survival action that permits the recovery or damages for pre-death pain and suffering.[8] Thus, the wrongful death action based upon negligence against the deceased seaman's employer under the Jones Act can include a pre-death pain and suffering claim, while the general maritime law unseaworthiness action against the owner of the vessel (including the seaman's employer) brought under DOHSA in the same lawsuit cannot.

No particular period of consciousness is necessary for a pre-death pain and suffering award.[9] Consciousness may be presumed in certain fact circumstances.[10] Recovery will not be allowed where there is no proof of either post-trauma consciousness or instantaneous death

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[7] 45 U.S.C. §59; Centeno v. Gulf Fleet Crews, Inc., 798 F. 2d 138 (5th Cir. 1987).

[8] Mobil Oil Co. v. Higgenbotham, 436 U.S. 618, 56 L.Ed. 2d 581 (1978).

[9] See Hinson v. S.S. Paros, 461 F. Supp. 219 (S.D. Tx. 1978), allowing recovery for suffering for only the "fleetest seconds." But see: Ghotra v. Bandila Shipping, Inc., 1997 A.M.C. 1936 (9th Cir. 1997), requiring consciousness for an "appreciable length of time" to allow recovery.

[10] See Cook v. Ross Island Sand and Gravel Co., 626 F.2d 746 (9th Cir. 1980).

occurs.[11]

Like seamen killed on the high seas, beneficiaries of seamen killed in state waters are also limited to pecuniary damages.[12] A general maritime law cause of action for the wrongful death of a seaman in state waters was formally recognized in Miles (supra), as the logical extension of the wrongful death action created in Moragne v. States Marine Lines, Inc. [13] Damages recoverable in this cause of action are limited to pecuniary loss. Recovery for lost future earnings is also prohibited because the Jones Act's survival provision limits recovery to losses during the decedent's lifetime.[14]

Although Miles established remedies for seamen killed in state waters against a Jones Act employer, it did not specifically address wrongful death remedies available against non-employer third parties. Such lawsuits are necessarily based on the general maritime law and can involve claims of unseaworthiness, negligence and/or products liability. These claims have nothing to do with the Jones Act; thus, the limitation on damages under the Jones Act carried over to the general maritime law unseaworthiness remedy in Miles is arguably irrelevant to claims against non-employer third parties.

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[11] Neal v. Barisich, Inc., 707 F. Supp. 863 (E.D.La. 1989).

[12] Miles, 111 S.Ct. 317,325.

[13] 111 S.Ct. at 320-324, citing Moragne, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed. 2d 339 (1970).

[14] Id.

The federal courts have struggled with this issue after Miles. There is no uniformity in the remedies available in these claims. Some courts have allowed the beneficiaries of seamen killed in state waters, where DOHSA does not apply, to recover non pecuniary damages.[15] Other courts have extended Miles to prohibit non-pecuniary damages in seamen territorial water death claims against non-employer third parties.[16] The U.S. Fifth Circuit recently held that the Miles prohibition extends to non-employer third party deaths.[17] This resolved a conflict among the lower courts in this U.S. Fifth Circuit and is consistent with the U.S. Ninth Circuit's position on this issue.

To date, the U.S. Supreme Court has not granted certiorari to resolve the issue of how far Miles should go in governing seaman third party tort claims. Given the conflicting positions of

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[15]Sugden v. Puget Sound Tug & Barge Co., 796 F. Supp. 455 (W.D.Wash. 1992); In Re Petition of Cleveland Tankers, Inc., 843 F. Supp. 1157 (E.D.Mich. 1994);

[16]See Trident Marine, Inc. v. M.V. ATTICOS, 876 F. Supp. 832 (E.D.La. 1994); Davis v. Bender Shipbuilding and Repair, 27 F.3d 426 (9th Cir. 1994); Ludahl v. Seaview Boat Yard, 1995 A.M.C. 440 (W.D. Wash. 1994);

Goose Creek Trawlers, Inc. - Limitation Proceedings, 1997 A.M.C. 1546 (E.D.N.C. 1997).

[17]Scarborough v. Clemco Industries, Inc., 392 F.3d 660 (5th Cir. 2004), cert. denied 125 S.Ct. 1932 (2005).

the lower courts and the frequency of these claims, one would think that the High Court would decide this issue. However, the Court denied certiorari in Scarborough, indicating that the inconsistent status quo will remain.

II NON-SEAMEN SEAFARERS

The U. S. Supreme Court has defined "non-seafarers" as "persons who are neither seamen covered by the Jones Act, nor longshore workers covered by the Longshoremen and Harbor Workers' Compensation Act.[18]

Like seamen, longshoremen are seafarers. Yet, the wrongful death remedies available to this class of maritime workers, whose remedies are also governed by a federal statute,[19] differ in many respects from their seamen brethren.

The U.S. Supreme Court decision that established a right of recovery for wrongful death under the general maritime law[20] involved a death of a longshoreman at a state water dock. The decision was rendered to correct the fact that DOHSA allowed a remedy for death resulting from unseaworthiness on the high seas, but the general maritime law did not provide recovery for a death in territorial waters where DOHSA did not apply.[21] Moragne did not address the issues of who would be the beneficiaries entitled to recovery and the measure of damages to be permitted

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18 Yamaha Motor Corp. v. Calhoun, 116 S.Ct. 619, 623, fn.2 (1996).

19 33 U.S.C. §901 et seq.

20 See Moragne (supra).

21 Moragne, 398 U.S. at 393, 401-402.

under the new general maritime law wrongful death cause of action.[22]

Unlike Jones Act seamen, longshoremen generally cannot sue their employers in tort.[23] The lone exceptions are contained in §905, which allows an action at law or in admiralty against an employer that does not secure compensation under the Act, and against a vessel as a third party in the event of injury to a longshoreman caused by vessel negligence, even if the vessel owner is also the claimant's employer who is otherwise liable to the longshoreman for compensation under the Longshore Act.[24]

If the longshoreman is killed on the high seas, then DOHSA provides the exclusive remedies whether the claim is brought under §905(b) or §933, which authorizes claims against non-employer third party tortfeasors under the Longshore Act.[25] Neither the Moragne general maritime law wrongful death action nor state law can supplant or supplement DOHSA. Stated differently, where the statutory remedy and the common law remedy conflict, the statute controls and preempts application of the non-statutory remedy.[26] The beneficiaries of longshoremen

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[22] Miles, 111 S.Ct. at 324.

[23] 33 U.S.C. §905(a).

[24] 33 U.S.C. §905(a); §905(b); §909; Smith v. M/V CAPTAIN FRED, 546 F.2d 119 (5th Cir. 1977).

[25] 33 U.S.C. §933(a).

[26] Mobil Oil Corp. v. Higgenbotham, 436 U.S. 618, 56 L. Ed.2d 581 (1978); Dooley v. Korean Airlines Co., Ltd., 118 S.Ct. 1890 (1998); Jacobs v.

killed on the high seas are, like their seamen counterparts, confined to pecuniary damages. However, unlike seamen deaths governed by the Jones Act, longshoremen do not have the right to recover pre-terminal pain and suffering because this, too, is a general maritime law claim preempted by DOHSA.[27]

However, the beneficiaries of longshoremen killed in territorial waters can recover non-pecuniary damages. Unlike DOHSA and the Jones Act, the Longshore Act does not explicitly limit recoverable damages to pecuniary damages. In fact, the Longshore Act is silent on the measure of damages under §905 and §933.[28] The U.S. Supreme Court established the right to non pecuniary damages in this limited fact situation in 1974.[29] Prior to Gaudet, District Courts that determined the measure of damages under the Moragne general maritime law wrongful death cause of action allowed elements of pecuniary loss (loss of support, funeral expenses, conscious pain and suffering and non-sexual services of the deceased).[30] Non-pecuniary loss of love and affection was rejected by most federal district and appellate courts.[31]

Northern King Shipping Co., Ltd., 180 F. 3d 713 (5th Cir. 1999).

[27] Id.

[28] 33 U.S.C. §§905 and 933.

[29] Sealand Services, Inc. v. Gaudet, 414 U.S. 573, 94 S.Ct. 806, 39 L. Ed..2d 9 (1974).

[30] 94 S.Ct. at 814-815.

[31] Id.

The U.S. Supreme Court charted a different course. It decided to grant non pecuniary damages to the widow of a longshoreman killed in state waters. Specifically, the court allowed recovery of "loss of society," defined as the monetary value of services that the decedent provided and would have continued to provide but for his wrongful death. The services include nurture, training, education and guidance that a child would have received from his now deceased parent and the services the decedent performed at home or for his spouse. This includes love, affection, care, companionship, comfort and protection.[32]

III NON-SEAFARERS

The U.S. Supreme Court's Calhoun[33] decision is seminal in the development of American wrongful death remedies. Calhoun involved claims by the parents of a 12 year old girl who was killed in Puerto Rican territorial waters when her jet ski collided with an anchored vessel. The parents' complaint asserted claims of negligence, strict liability and breach of implied warranties and sought damages for future lost earnings, loss of society, loss of support and services, funeral expenses, and punitive damages, all based upon Pennsylvania's wrongful death and survival statutes. Jurisdiction was predicated on diversity and admiralty.

Yamaha moved for summary judgment, contending that the Moragne general maritime law wrongful death action provided the exclusive basis for recovery and displaced all state law remedies. Yamaha further argued that Moragne allowed only recovery of funeral expenses. The

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[32] 94 S.Ct. at 815. See: McKenzie v. C & G Boat Works, Inc., et al, 322 F. Supp. 2d 1330 (S.D. Ala. 2004) for analysis of Gaudet damages.

[33] See fn. 17 (supra).

case ultimately made its way to the U.S. Supreme Court, which defined the issue for decision as follows:

> Does the federal maritime claim for wrongful death recognized in Moragne supply the exclusive remedy in cases involving the deaths of non-seafarers in territorial waters?[34]

After concluding that the plaintiffs' claims constituted a maritime tort governed by substantive admiralty law principles, the court undertook a lengthy analysis ofMoragne in recognition of the decision as a potential obstacle to the application of state law. It decided that the Moragne general maritime death remedy is not restricted to seafarers killed in state waters. The court held that the cause of action to redress state water maritime torts causing death is provided by the general maritime law regardless of the status of the decedent. After Calhoun, all general maritime law claims arising out of state water deaths are considered Moragne actions.

This conclusion left open the question of what law applies to the measure of damages. Citing Grubart v. Great Lakes Dredge and Dock Co.,[35] the court recognized that admiralty jurisdiction did not automatically displace state law.[36] After acknowledging that the Jones Act and DOHSA did not apply to non-seafarer state water deaths (i.e. there is no applicable federal statute),the court acknowledged that Moragne did not affect previous high court decisions that

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34 Calhoun, 116 S.Ct. at 623.

35 115 S.Ct. 1043 (1995).

36 Calhoun, 116 S.Ct. at 623.

authorized use of state wrongful death statutes to redress claims asserted for non-seafarers.[37] Because utilization of state wrongful death statutes would not do unacceptable violence to established admiralty principles despite the varied remedies available under different state laws and the fact that state law death awards are more generous than those allowed in maritime wrongful death cases, the court upheld the traditional application of state law remedies to non-seafarer wrongful death cases. The court stated that "state remedies remain applicable in such cases and have not been displaced by the federal maritime wrongful death action recognized in Moragne v. States Marine Lines, Inc. (Cite omitted).[38]

One issue remained—which law supplied the standard of liability.[39] On remand, the U.S. Third Circuit held that the importance of uniformity in maritime law mandated that "federal maritime standards govern the adjudication of a defendant's ...putative liability in an admiralty action brought pursuant to a state wrongful death/survival statute."[40] The Appeal Court necessarily concluded that the need for uniformity on the issue of liability is greater than uniformity in the measure of damages.

The Third Circuit then determined which state's law governed the plaintiffs' damages claims. In an interesting twist, the court decided as a threshold question that federal choice of law

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37 See, Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) and its progeny.

38 Calhoun, 116 S.Ct. at 621-22.

39 See 116. S.Ct. at 629 fn.14.

40 Calhoun v. Yamaha Motor Corp., 216 F.3d 338, 351 (3rd Cir. 2000).

rules governed this issue. Because maritime jurisdiction attached, the Lauritzen[41] choice of law factors must be applied. The court conducted a Lauritzen analysis and decided that Pennsylvania law applied to the compensatory damage claim and Puerto Rican law applied to the punitive damage claim. This, because the decedent's domiciliary state had a greater interest in making the plaintiff whole while the state where the casualty occurred had a stronger interest in punishing the wrongdoer.[42] Puerto Rican law does not allow punitive damages, so this claim was dismissed.

The end result is that a non seafarer killed in the territorial waters of a foreign state will have his or her liability claim governed by the federal general maritime law, compensatory damages claims governed by the victim's home state and punitive damages governed by the place of the wrongful act.

The U. S. Eleventh Circuit Court of Appeals has its own peculiar notions of non-seafarer rights and remedies under the general maritime law. In September of 1993, the commercial towing vessel M/V MOVILLA struck a railroad bridge after an errant navigational turn in heavy fog. Shortly thereafter, an Amtrak passenger train derailed while attempting to traverse the track. 47 train passengers died, many others suffered personal injury, and the train and bridge were damaged.

The trial court correctly held that the incident fell within the federal court's admiralty

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41 Lauritzen v. Larsen, 345 U.S. 571, 73 S.Ct. 921, 97 L. Ed. 1254 (1953).

42 Calhoun, 216 F.3d at 347-48.

jurisdiction. It then looked to Calhoun to hold that the Alabama Wrongful Death Statute[43] provided the measure of damages available to the wrongful death plaintiffs. Under the Alabama Wrongful Death Statute, the plaintiffs were entitled to recover punitive damages upon a showing of ordinary negligence.

On interlocutory review, the U.S. Eleventh Circuit reversed.[44] Citing the conflict between recovery of punitive damages under the Alabama Wrongful Death Statute upon a showing of mere negligence, versus the general maritime law requirement of willful and wanton misconduct, the court held that the general maritime law[45] provided the remedies. The court went a step further. It held that the wrongful death plaintiffs could recover punitive damages under the general maritime law based upon a showing of intentional or wanton and reckless conduct on the part of the defendants amounting to a conscious disregard for the rights of others.[46]

With respect to the appeal court, this holding is inconsistent with Calhoun and has disastrous consequences for future state water deaths in Alabama. Recall that the Calhoun

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[43] Ala. Code Sec. 6-5-410 (1993).

[44] In re Amtrak "Sunset Limited" Train Crash in Bayou Canot, AL, on September 22, 1993, 121 F.3d 1421 (11th Cir. 1997).

[45] Moragne (infer)

[46] 121 F.3d at 1428, citing CEH, Inc. v. F/V SEAFARER, 70 F.3d 694, 699 (1st Cir. 1995).

plaintiff sued under Pennsylvania's Wrongful Death and Survival Statutes, which allow recovery for loss of society, loss of support and services, funeral expenses and punitive damages. The U.S. Supreme Court recognized that application of state wrongful death statutes would result in varied remedies. The court harkened back to its historic use of state statutes to redress claims for non-seafarer deaths in state waters and reaffirmed this principle. There are many state death statutes that are as or more inconsistent with the general maritime law than the Alabama Wrongful Death Statute. If the remaining circuits followed the U.S. Eleventh Circuit's reasoning, the Calhoun opinion would be rendered meaningless.

An example of the problem created by Amtrak is Tucker v. Fearn. [47] This case involved a state water collision between a motorized vessel and a sailboat. Clearly it falls squarely within the Calhoun analysis. However, in light of the precedent set by Amtrak, plaintiffs were forced to seek recovery on behalf of a non-dependent survivor (father) of a non-seaman minor under the general maritime law, the very result that Calhoun rejected as too restrictive. Because the plaintiff was a non-dependent survivor, unable to recover under the general maritime law, and the Alabama Wrongful Death Statute did not apply, the plaintiff, the decedent's father, was afforded no non-pecuniary recovery for the wrongful death of his son.

Presumably, if the same accident had occurred in Pennsylvania, the Pennsylvania Wrongful Death and Survival Statutes would allow recovery. Louisiana law would certainly afford such recovery.[48] This father was denied recovery simply based upon the location of his

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[47] 333 F. 3d 1216 (ll th Cir. 2003).

[48] La. Civ. Code Art. 2315.

son's marine death.

So much for uniformity.

IV PUNITIVE DAMAGES

It should be noted that the U.S. Supreme Court has never held that punitive damages are unavailable under the Jones Act or the general maritime law. Miles dealt solely with non-pecuniary loss of society and future lost earnings damages. The court never discussed or eluded to punitive damages in the decision.

Yet, Miles provided the impetus for a number of courts to deny seamen the right to recover general maritime law punitive damages.[49] Similarly, punitive damages are generally regarded as unavailable under the Jones Act.[50] Most Judges in the Eastern District of Louisiana have denied punitive damages to seamen.[51]

Beneficiaries of anyone killed on the high seas, be they seafarer or non-seafarer, cannot

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[49] Horsley v. Mobil Oil Corp., 15 F.3d 200 (1st Cir. 1995); Miller v. American President Lines, 989 F. 2d 1459 (6th Cir. 1993); Guevara v. Maritime Overseas Corp., 59 F.3d 1496 (5th Cir. 1995).

[50] Bergen v. F/V ST. PATRICK, 816 F.2d 1345 (9th Cir. 1987); Dyer v. Mary Shipping Co., 650 F.2d 622, 626 (5th Cir. 1981).

[51] Anderson v. Texaco, 797 F. Supp. 531, 536 (E.D. La. 1992); In Re: Waterman S.S. Corp., 780 F. Supp. 1093, 1095 (E. D. La. 1992).

claim punitive damages.[52] A court in the Southern District of Texas attempted to circumvent this prohibition in a particularly egregious fact situation by applying the Texas Wrongful Death statute to a seaman who died in Texas as a result of grossly negligent conduct in causing and exacerbating injuries aboard a vessel on the high seas. The district court held that the Louisiana company hired to manage the vessel could be sued under the Texas death statute due to the location of this entity's wanton conduct and the place of the seaman's death, both in Texas. Under the statute, the seaman's beneficiaries were awarded punitive damages.[53] The U.S. Fifth Circuit reversed and held that DOHSA applied and punitive damages were therefore unavailable. The proper focus in this fact situation is on "the decedent's location at the time of injury, rather than the tortfeasor's location."[54]

Non-seamen are fairing better in this area of remedies, Alabama notwithstanding. The Third Circuit decision in Calhoun allowed punitive damages under state law death remedies. The sole reason that punitive damages were not considered was that Puerto Rican law prohibits such damages in wrongful death cases. However, lower courts have allowed punitive damages for longshoremen[55] and non-seafarers[56] injured in state waters as a result of wanton misconduct.

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52 46 U.S.C. §761, et seq.; Miles (supra).

53 Motts v. M/V GREEN WAVE, 50 F. Supp. 2d 634 (S.D. Tx. 1999).

54 Motts v. M/V GREEN WAVE, 210 F. 3d 565, 572 (5th Cir. 2000).

55 Gravatt v. City of New York, 78 F. Supp.2d 438 (S.D. N.Y. 1999);
Rutherford v. Mallard Bay Drilling, L.L.C., 2000 WL 805230

Although none of these matters involve wrongful deaths, the same rationale allowing punitive damages in state water personal injury cases applies in wrongful death claims. Neither situation is governed by a federal statute, and, as stated herein, both the general maritime law and various state laws allow for non-pecuniary recovery.

V THE LATEST TWIST

On April 5, 2000, President Clinton signed into law Public Law 106-181. The language that passed was contained in §404 of House Resolution 1000. Known as the Commercial Aviation Exception, the new Act amends §761(b) to move DOHSA jurisdiction out from its former three mile limit to twelve nautical miles in the case of commercial aviation accidents. Thus, any plane crash twelve nautical miles or closer to the shore of any state, the District of Columbia, or the territories or dependencies of the United States is no longer covered by DOHSA. The statute provides that "the rules applicable under state, federal and other appropriate law shall apply" in this circumstance.

Additionally, §762(b) expands compensation in commercial aviation accidents covered by DOHSA (i.e. those occurring on the high seas beyond the new twelve nautical mile jurisdictional limit) to include "additional compensation for non-pecuniary damages for wrongful death of a decedent." Non-pecuniary damages are defined as "loss of care, comfort and companionship." Punitive damages are specifically prohibited.

(E.D. La. 2000).

[56] In Re Horizon Cruises Litigation, 101 F. Supp. 2d 204 (S.D.N.Y. 2000), which contains an excellent overview of the historical availability of punitive damages in non-seafarer maritime personal injury cases.

The commercial aviation exception was made retroactive to apply to any death occurring after July 16, 1996, the date of the TWA 800 incident.

There will be extensive litigation as to what law applies between three and twelve miles in aviation disasters. Plaintiffs will likely argue that either the Moragne/Gaudet elements of damages, adjoining state law or some hybrid apply, whichever is more beneficial. Given that such a casualty is analogous to non-seafarer deaths in state waters, Calhoun may guide the lower courts.

In Brown, et al v. Eurocopter, S.A., et al,[57] the first case which applied the Commercial Aviation Exception to DOSHA, the surviving widow and daughter of a helicopter pilot killed when his helicopter crashed into a fixed oil platform in the Gulf of Mexico moved the court for an order stating that DOHSA as amended applied to all pending claims in the case. The defendants contended that the amended DOHSA statute was inapplicable because did not intend for the phrase "commercial aviation accident" to apply to disasters such as a fatal helicopter crash. The court undertook a statutory construction/plain meaning analysis, reviewed federal aviation regulations pertaining to air commerce and reviewed the legislative history behind the DOHSA amendment and rejected defendants' more restrictive definition of commercial aviation. It held that a helicopter crash falls within the amended DOHSA statue. The plaintiffs were therefore entitled to recover non-pecuniary damages.

VI OBSERVATIONS

The quest for uniformity in the maritime law has created the following result:

A. Seafarers killed on the high seas—pecuniary losses only;

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[57] 111 F. Supp. 2d 859 (S.D. Tex. 2000).

B. Non-seafarers killed on the high seas—pecuniary losses only except in commercial aviation accidents, where non-pecuniary damages in the form of loss of care, comfort and companionship are allowed;

C. Seamen killed in state waters—pecuniary losses only;

D. Longshoremen killed in state waters—Gaudet damages which include non-pecuniary losses; and

E. Non-seafarers killed in state waters—state law elements of damage, except in Alabama.

Further, DOHSA jurisdiction is more restricted in commercial aviation disasters falling within admiralty jurisdiction than in boat disasters.

The upshot of the quest for uniformity is that Jones Act seamen, those persons for whom the maritime law should grant the greatest protection, are now the least favored class of individuals under U.S. maritime wrongful death law. Beneficiaries of the captain of a plane whose job may fortuitously take him over navigable waters has greater remedies than the captain of a vessel who faces the perils of the sea regularly. Beneficiaries of a jet-ski operator killed in a state permitting punitive damages has greater rights than a tugboat or supply boat captain killed in the same territorial waters. Clearly, non-seafarers are the new wards of the admiralty court.